U.S.A. Polymer Corp. *and* Texas-Oklahoma-Arkansas District Council—UNITE. Cases 16–CA–17189 and 16–CA–17455

August 24, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 25, 1996, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed a brief in support of the General Counsel's exceptions and a response in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions to the extent discussed below, and to adopt the recommended Order, as modified and set forth in full below.[2]

We agree with the judge's findings that the Respondent committed numerous, egregious violations of Section 8(a)(1), (3), and (4) of the Act and that a bargaining order should issue under the principles enunciated in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).[3]

The Board will issue a bargaining order, absent an election, in two categories of cases. *NLRB v. Gissel Packing Co*., supra. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength and impede election processes." In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order." *NLRB v. Gissel Packing Co*., supra at 613, 614–615; and *Cassis Management Corp*., 323 NLRB 456, 459 (1997).

We find that the violations at issue in the instant case constitute category I conduct within the meaning of *Gissel*. The Respondent embarked on a series of pervasive and increasingly coercive unfair labor practices within weeks of the advent of the employees' union activity. The first union contact with employees occurred in the latter part of September 1994, and the Union began its formal organizing campaign in the early part of October 1994. By January 27, 1995, the Union had attained majority status in the bargaining unit.

As more fully described in the judge's decision, the Respondent unlawfully interrogated employees about their union activity and the union activity of their fellow employees. The Respondent also unlawfully threatened employees with more onerous working conditions, physical harm, layoff, discharge and other unspecified reprisals for engaging in union and protected concerted activity. Employees were unlawfully subjected to surveillance and unlawfully promised a bonus or other rewards for not supporting the Union. The interrogations and threats were widespread, involving 7 different supervisors and at least 20 different employees.[4]

Furthermore, the Respondent made good on its threat of layoff or discharge by laying off 29 unit employees between January 27 and 30, 1995. These 29 employees represented 45 percent of the employees in the proposed bargaining unit and included 9 of 10 members of the employees' organizing committee.[5] To compound the impact of this unlawful conduct, the Respondent further violated the Act by issuing employees being laid off in January 1995 a letter requiring them to call on a daily basis, with failure to do so on 2 consecutive days "(caus-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] In its brief in support of exceptions, the Respondent contends that there has been no determination of the appropriate bargaining unit. The judge did, in fact, make such findings in his decision at fn. 59. and in his conclusions of law, item 3. The Respondent has neither filed exceptions to these findings nor disputed the judge's description of positions within the production and maintenance unit. Accordingly, we adopt the judge's finding concerning the unit appropriate for collective-bargaining within the meaning of Sec. 9(b) of the Act as set forth in item 3 of his conclusions of law.

Similarly, the Respondent has not filed exceptions to the judge's findings that the Union attained majority status in January 1995 or to his findings concerning the authentication of 47 authorization cards in the unit of 64 employees. The record shows that 41 cards were signed on or before January 21, 1995, and that the remaining 6 cards were signed on or before January 27, 1995. Accordingly, we adopt the judge's findings concerning majority status.

[4] The Respondent's defense to these allegations rested primarily on its contention that it had no knowledge of the union activity. Although the Respondent filed exceptions to these violations of Sec. 8(a)(1) found by the judge, it did not address the individual incidents in its supporting brief. We adopt the judge's findings.

The Respondent also excepts to the finding that Carlos Hallatt is an agent of the Respondent. We note that Hallatt's conduct is at issue only in connection with his alleged interrogation of Lucio Aviles in January 1995. In view of the numerous instances of unlawful interrogations by other respondent officials, a finding on this allegation would be cumulative and would not affect the remedy.

[5] In adopting the judge's finding that the layoff of these 29 employees violated Sec. 8(a)(3) and (1) of the Act, we find it unnecessary to rely on the statistical analyses presented by the Charging Party and apparently relied on by the judge.

ing) us to consider you unavailable for work or having resigned your position with our company." In addition, the Respondent's supervisors told remaining employees that those selected had been chosen because of their support for the Union in accord with the policy of John Bazbaz, the Respondent's president.

After the General Counsel issued a complaint concerning the conduct summarized above, the Respondent continued to violate the Act by penalizing employees who testified as witnesses for the General Counsel at the ensuing unfair labor practice hearing. Specifically, the judge found, and we agree, that the Respondent violated Section 8(a)(4) and (1) of the Act by interrogating witnesses for the General Counsel after they had testified, asking other employees if they had received subpoenas to testify, and advising them that they could ignore the subpoenas. In addition, the Respondent suddenly disciplined employees who had been witnesses for talking among themselves, although there was no rule prohibiting that behavior. In this regard, one employee received an oral warning and two received written warnings. When one of the latter refused to sign the written warning because he believed he had done nothing wrong, Javier Guerrero, assistant to Bazbaz, fired him.[6] The Respondent also reduced employees' regular working hours and overtime after they had testified, while other employees who had not testified were allowed to keep their normal hours and overtime. Supervisor Israel Zepeda told another employee that he had been instructed by Bazbaz and Guerrero to make things hard on him for testifying against the Company.

In view of the foregoing, we find that the Respondent's intimidating course of conduct places it among those exceptional cases warranting a bargaining order under category 1 of the *Gissel* standard, because traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible. See *Cassis Management Corp*., supra at 459. It cannot be gainsaid that the Respondent's discriminatory layoff of nearly one-half of the bargaining unit, coupled with contemporaneous statements that the reason for the layoffs was the employees' support for the Union and the extensive conduct violative of Section 8(a)(1) and (4) of the Act following the issuance of the first complaint, constitute unfair labor practices that are both outrageous and pervasive. The restorative effect that Board–ordered reinstatement may have on unit employees is severely diminished by this pattern of conduct. Accordingly, we find that a bargaining order is warranted under category 1 standards.[7]

Even if we were to find, however, that the violations were less than "outrageous," a bargaining order is warranted under category II standards. The Board has long held that threats of job loss are particularly coercive and likely to undermine the possibility of holding a fair election for an extended period. *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1141 (3d Cir. 1995). When such threats are made, employees receive an unforgettable message that any efforts they make to improve their working conditions could instead result in the loss of their livelihood. *Electro-Voice, Inc.,* 320 NLRB 1094, 1095 (1996). Here, where the employer proceeded to carry out its threats against so substantial a number of bargaining unit members, the message is not likely to be soon forgotten. As the Board commented in *America's Best Quality Coatings Corp.*,[8] discharge of employees because of union activity "goes to the very heart of the Act." The Respondent's outrageous conduct did not end with its massive unlawful layoff of union supporters, "the ultimate retaliation" for supporting a union.[9] Those employees who remained received a continuing message that those who were laid off had been "rewarded" for their union support. They also received the message that retribution for supporting the Union or testifying as witnesses for the General Counsel was the policy of the Respondent's highest official, John Bazbaz. In these circumstances, the possibility that employees would thereafter express their uncoerced desires through the mechanism of an election is slight, if it exists at all. Accordingly, under the circumstances here, it is clear that a bargaining order is not merely appropriate, but necessary.[10]

[6] Bazbaz subsequently rescinded the dismissal.

[7] Member Hurtgen finds it unnecessary to pass on whether a bargaining order is warranted under category 1 standards. He agrees with his colleagues that a bargaining order is warranted under category II standards. Member Hurtgen finds it unnecessary to pass on the unpled (a)(1) violations found by the judge. In his view, these alleged violations are cumulative. Member Hurtgen finds it unnecessary to pass on the question whether employee Montes de Oca was a guard.

[8] 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

[9] *Cassis Management Corp.,* 323 NLRB 456, 457 (1997).

[10] We reach this conclusion despite the passage of time of 4 years since the unfair labor practices occurred and 3 years since the judge's decision issued. As in *Garvey Marine, Inc*., 328 NLRB 991,996–997 (1999), they conclude that the passage of time does not diminish the need for and appropriateness of a bargaining order in this case.

Finally, Member Hurtgen does not agree with the Board's decision in *Garvey Marine, Inc.,* supra at 998. However he notes that, in the instant case, the Respondent does not contend that the passage of time militates against the appropriateness of a bargaining order.

The Respondent has excepted to the judge's finding that it violated Sec. 8(a)(5) by refusing to recognize and bargain with the Union on the ground that there is no such allegation in the complaint as amended. In the particular circumstances of this case, we will delete the judge's finding since the General Counsel did not request this finding, and finding this violation will not affect the remedy here. As the Board explained in *Peaker Run Coal Co.*, 228 NLRB 93, 93–94 (1977), nothing in the Supreme Court's *Gissel* opinion makes a finding of Sec. 8(a)(5) a prerequisite for issuing a bargaining order if the Board has found that a union has attained majority status and that the respondent employer has committed violations of the Act, falling within either category I or category II as described in *Gissel*, which have undermined the union's majority status and "fatally impeded the holding of a fair election." As further explained in *Peaker Run*, in the absence of an 8(a)(5) allegation, the employer's obligation to recognize and bargain

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 9 and renumber the following conclusion of law accordingly.

AMENDED REMEDY

Because of the serious nature of the Respondent's numerous violations of the Act and their impact on the entire unit, we require the Respondent to bargain with the Charging Party as the duly designated representative of the employees in the appropriate unit.

Because of its discriminatory discharge of the employees named in paragraph 5(a) of the judge's conclusions of law, the Respondent must offer those employees reinstatement to the bargaining unit positions they held and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11]

The Respondent unlawfully retaliated against employees William Rosales, Camillo Ramirez, Jose Melendez, and Jesus Martines by denying them scheduled working and overtime hours. It must make them whole for their lost earnings in the manner set out above.

The Respondent must reinstate the position of electrician at its facility and offer Luis Aviles reinstatement to this position in addition to the backpay set forth above.

The Respondent must rescind the written warnings it gave William Rosales and Marco Posadas, remove any record of those warning from their personnel files, and inform them in writing that this has been done and that those warnings will not be used against them in any way.

Because of the serious nature of the Respondent's violations and because of the Respondent's egregious, widespread misconduct that demonstrates a general disregard for its employees' fundamental rights, we shall issue a broad order that requires the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, U.S.A. Polymer Corp., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and activities and the sympathies and activities of fellow employees, and demeaning the Union in coercive conversations with employees.

(b) Threatening employees with more onerous working conditions, physical harm, layoff, discharge, and other unspecified reprisals for engaging in union or other protected concerted activities.

(c) Creating the impression of surveillance or subjecting employees to surveillance because of their union or other protected concerted activities.

(d) Promising employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

(e) Permanently laying off employees because they engaged in union or other protected concerted activities

with the union commences on "the date on which the employer embarked on its unlawful antiunion campaign" Id. at 93. Accord: *Ellis Electric*, 315 NLRB 1187, 1188 (1994). In this case, the Respondent's obligation commenced on January 27, 1995, when the Union had attained majority status and the Respondent began its unlawful antiunion campaign with the discriminatory layoffs of unit employees.

In its exceptions, the Respondent contends that the merger of the Charging Party in Case 16–CA–17189, Texas-Oklahoma-Arkansas District Council, ILGWU, a/w International Ladies Garment Workers' Union, with the Amalgamated Clothing and Textile Workers to form the Union of Needle Trades, Industrial and Textile Employees (UNITE) precludes the issuance of a bargaining order because it raises a question of continuity of representation. As described more fully in the judge's decision, there was considerable testimony and documentation by the Charging Party to support its position that the post–merger entity, UNITE, provides for substantial continuity of representation under the four-part test set forth in *Western Commercial Transport,* 288 NLRB 214 (1988). The burden of proof is on the party seeking to prove discontinuity. *Insulfab Plastics*, 274 NLRB 817, 821 (1985), enf. 739 F.2d 961 (1st Cir. 1986). Here, the Respondent has not met that burden. Its reliance on *Pye v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994), is misplaced, because here, unlike there, the new entity will utilize the same leaders for contract administration and negotiation. Moreover, the same rules, dues and infrastructure are in place under UNITE as were present under the ILGWU. The Respondent relies primarily on the fact that the merger will result in an entity with a membership that is more than double the size of the ILGWU. That, however, is a natural result of a merger that may result in increased clout, but does not diminish the identity of the organization. *Insulfab*, supra at 823.

[11] As noted by the judge, the Respondent discriminatorily discharged Marco Posadas, but avoided any backpay liability by reinstating him before he suffered any backpay liability.

With regard to the alleged discriminatory layoff of 29 employees on January 27, the judge found that the layoffs of all those employees violated Sec. 8(a)(3) and (1). He also found, however, that "a layoff of some level would have occurred at some point well after January 1995 but *before* June 1995" (emphasis added). He recommended leaving to compliance the question of which employees would have been affected by such a subsequent layoff or layoffs. We agree and note that precedent dictates that in order to cut off the backpay of any given discriminatee or discriminatees, the Respondent must show that he or she would have been laid off in any event for a nondiscriminatory reason on the date for which a backpay cutoff is urged. See, e.g., *EDP Medical Computer Systems*, 302 NLRB 54, 55 (1991), enfd. mem. 959 F.2d 1101 (D.C. Cir. 1992) (respondent must show, as an affirmative defense, that discriminatee's job was eliminated for nondiscriminatory reasons after his unlawful discharge, in order to cut off backpay liability*)*; *Pacemaker Driver Service*, 290 NLRB 405 (1988), affd. sub nom. *Bales v. NLRB*, 914 F.2d 92 (6th Cir. 1990) (employer which caused employee terminations when it closed a terminal in violation of Sec. 8(a)(3) carried its burden of showing that it would have closed the terminal for nondiscriminatory reasons on a particular date nearly 3 years later and that it would not have relocated the employees elsewhere; backpay ends at that point).

and to discourage them and other employees from supporting the Union or engaging in other protected concerted activity.

(f) Selecting employees for permanent layoff because they supported the Union or engaged in other protected concerted activity.

(g) Eliminating the job classification of electrician to avoid rehiring its discharged electrician because he supported the Union and engaged in union or other protected concerted activity.

(h) Verbally warning employees not to talk with other employees or threatening employees with unspecified reprisals because they gave testimony contrary to the interests of the Respondent in a Board hearing.

(i) Interrogating employees about their testimony given in a Board proceeding and advising employees to ignore Board issued subpoenas.

(j) Reducing the working hours of employees and withholding overtime work to employees because they gave testimony in a Board hearing and because they supported the Union or otherwise engaged in protected concerted activity.

(k) Imposing more onerous working conditions on employees in order to induce them to quit their employment because they gave testimony in a Board proceeding, supported the Union, and engaged in other protected concerted activity.

(l) Issuing written warnings to employees and discharging employees because they gave testimony in a Board proceeding and supported the Union or engaged in other protected concerted activity.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

(b) Within 14 days, offer the employees named below immediate and full reinstatement to their former bargaining unit jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

Miguel Alanis	Mario Aparicio
Lucio Aviles	Julio Hector Garcia
Hugo Benavides	Jose Giron
Alejandro Blasic	Oscar Godines
Rudolfo Bocanegro	German Joya
Edgar Gerardo Carrera	Luis Martines
Luis Castro	Nery Mendoza
Nicholas Chajon	Pedro Molgar
Elias Escobar	Miguel Molina
Miguel Angel Molina	Mauro Moran
Bethuel Montes De Oca	Walter Jose Orellana
Felix Jovel Palacios	Noe Ramirez
Manuel Perez	Nelson Rodriquez
Mario Perez	Jose Rosales
Lionel Campoverde Verde	

(c) Make whole William Rosales, Camillo Ramirez, Jose Melendez, and Jesus Martines for the unlawful denial of their scheduled working hours and overtime hours in the manner specified in the amended remedy section of this decision.

(d) Within 14 days rescind the written warnings given to William Rosales and Marco Posadas and remove any record of such warnings from their personnel files. Within 3 days thereafter inform them in writing that this has been done and that such warnings will not be used against them in any way.

(e) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay under the terms of the Order.

(f) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice in both English and Spanish, marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since November 1, 1994.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union sympathies and activities and the union sympathies and activities of fellow employees, and demean the Union in coercive conversations with employees.

WE WILL NOT threaten employees with more onerous working conditions, physical harm, layoff, discharge, and other unspecified reprisals for engaging in union or other protected concerted activities.

WE WILL NOT create the impression of surveillance or subject employees to surveillance because of their union or other protected concerted activities.

WE WILL NOT promise employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

WE WILL NOT permanently lay off employees because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity.

WE WILL NOT select employees for permanent layoff because they supported the Union or engaged in other protected concerted activity.

WE WILL NOT eliminate the job classification of electrician to avoid rehiring our discharged electrician because he supported the Union and engaged in union or other protected concerted activities.

WE WILL NOT verbally warn employees not to talk with other employees or threaten employees with unspecified reprisals because they gave testimony in a National Labor Relations Board hearing.

WE WILL NOT interrogate employees about their testimony given in a National Labor Relations Board proceeding and advise employees to ignore Board issued subpoenas.

WE WILL NOT reduce the working hours of employees and withhold overtime work to employees because they gave testimony in a National Labor Relations Board hearing and because they supported the Union or otherwise engaged in protected concerted activity.

WE WILL NOT impose more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a National Labor Relations Board proceeding, supported the Union, and engaged in other protected concerted activity.

WE WILL NOT issue written warnings to employees and discharge employees because they gave testimony in a National Labor Relations Board proceeding and supported the Union or engaged in other protected concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

WE WILL, within 14 days of the date of the Board's Order, offer the employees named below immediate and full reinstatement to their former bargaining unit jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

Miguel Alanis	Mario Aparicio
Lucio Aviles	Julio Hector Garcia
Hugo Benavides	Jose Giron
Alejandro Blasic	Oscar Godines
Rudolfo Bocanegro	German Joya
Edgar Gerardo Carrera	Luis Martines
Luis Castro	Nery Mendoza
Nicholas Chajon	Pedro Molgar
Elias Escobar	Miguel Molina
Miguel Angel Molina	Mauro Moran
Bethuel Montes De Oca	Walter Jose Orellana
Felix Jovel Palacios	Noe Ramirez
Manuel Perez	Nelson Rodriquez
Mario Perez	Jose Rosales

Lionel Campoverde Verde

WE WILL make whole William Rosales, Camilio Ramirez, Jose Melendez, and Jesus Martines for the unlawful denial of their scheduled working hours and/or overtime hours, with interest.

WE WILL, within 14 days from the date of the Board's Order, rescind the written warnings given to William Rosales and Marco Posadas, remove such warnings from their personnel files and WE WILL, within 3 days thereafter, inform them in writing that this has been done and that such warnings will not be used against them in any way.

U.S.A. POLYMER CORP.

Robert J. Levy, II, *Esq.,* for the General Counsel.
Whitney McGee Head, Esq. and *Deborah O. Cantrell, Esq*., of Houston, Texas, for the Respondent.
Liane A. Janovsky, Esq., of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case[1] was tried in Houston, Texas, on June 5–21 and October 17 and 18, 1995:[2] Based on charges filed by the predecessor of Texas-Oklahoma-Arkansas District Council—UNITE (the Union) complaint and notice of hearing issued on March 21, 1995, and an amended complaint issued on May 5, 1995. The complaints allege that U.S.A. Polymer Corp. (the Respondent or Company) engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Subsequent to the closing of the record in Case 16–CA–17189 on June 21, 1995, additional charges were filed by the Union against Respondent and a complaint issued in Case 16–CA–17455 alleging that Respondent has engaged in further conduct in violation of Section 8(a)(1) and (3) of the Act and additionally, has violated Section 8(a)(4) of the Act. The General Counsel in these proceedings filed a motion to reopen the record in Case 16–CA–17189 and consolidate it with Case 16–CA–17455, alleging that the matters involved in the new case are intimately related to matters already litigated. There was no opposition to this motion and it was granted. Hearing on the consolidated complaint was held October 17 and 18, 1995.

Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

[1] The Charging Party in Case 16–CA–17189 was Texas-Oklahoma-Arkansas District Council, ILGWU, a/w International Ladies' Garment Workers' Union. On July 1, 1995, this Union merged with the Amalgamated Clothing and Textile Workers Union to form a new union known an Union of Needle Trades, Industrial and Textile Employees (UNITE).

[2] All dates in the months of September, October, November, and December are in 1994 unless otherwise noted. All dates in the months of January, February, March, April, May, June, July, and August are in 1995 unless otherwise noted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in the recycling of plastic material for commercial sale at its office and place of business in Houston, Texas. It admits in its answer to the complaints and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Respondent is a wholly owned subsidiary of Z. L. Star, a holding company which owns a number of other enterprises including a company called Polytex Fibers. In 1992, Respondent was created from a division of Polytex Fibers and became an independent company. The officers and supervisors of Respondent are: Isaac Bazbaz, president of Z.L. Star, John Bazbaz, president of Respondent, Javier Guerrero, assistant to John Bazbaz, Luis Mendoza, plant manager, and Fernando Molina, Sergio Palacios, German Robles, Cesar Portillo, Israel Zepeda and Augustine Garcia, plant supervisors.[3] During most of the timeframe, January 1994 through January 1995, it employed about 60–65 nonsupervisory employees engaged in various aspects of recycling plastic materials. The Company recycles high-density polyethylene and polypropylene. In its polyethylene production, it recycles postconsumer polyethylene resin, which is derived from, inter alia, milk jugs and detergent bottles. The raw material for recycling is purchased in bales, then washed, blended, ground, and extruded or pelletized to make a finished product. The pelletized recycled plastic is then sold to other companies which use the product in the manufacture of new containers and other products. In its process the Respondent uses a number of machines, including washers, grinders, and extruder/pelletizers. Its polypropylene process utilizes raw materials obtained from commercial sources and is not dependent upon consumer recycling. Employees who work on the washers, blenders, grinders, and the extruder are called operators and helpers. The Company also employs forklift operators, and a lab technician. Prior to a layoff which occurred in late January it employed electricians and mechanics who performed most electrical and mechanical maintenance duties at the plant. Subsequent to the layoff these duties have been subcontracted. In the event a representation election were to be held, the unit would likely include the operators, helpers, forklift drivers, electricians, and mechanics.

The Union's involvement with Respondent began in the last part of September, when a Houston man with connections with a number of unions, Andres Reyes Garza, received a call from an employee of Respondent, Luis Castro, who expressed interest among the employees of Respondent in having union repre-

[3] The names of various persons involved in this proceeding are spelled differently in various parts of the transcript and in the pleadings and briefs. I have adopted one spelling for each person and have stuck with the spelling throughout this decision. If the spelling I have adopted is not the correct one, I apologize (to) the person whose name is misspelled.

sentation. Garza passed the message on to the Union and was employed as an assistant organizer and was given clearance to continue talking to the employees. The Union embarked on a formal organizing campaign in the early part of October. The Union also assigned one of its full-time organizers, Ricardo Medrano, to work on organizing Respondent's employees. With the help of some interested employees, the organizers secured the names, addresses, and phone numbers of the other employees. They began a study of Respondent's business, looking at its ownership, management, competition, and customers. They also looked into the wage and benefit structure and at plant working conditions. House calls on employees were conducted and meetings with employees held in October, November, and December. Interest in representation was high and in January the Union established an employee organizing committee. The 10 members of this committee were Lucio Aviles, Alejandro Blasio, Rodolfo Bocanegra, Edgar Carrera, Luis Castro, Javier Garcia, Jose Giron, Guadalupe Leal, Luis Martines, Pedro Molgar; Nery Mendoza, Miguel Molina, Manuel Perez, Felix Palacios, Mario Perez, Miguel Lancan Perez, Marco Posadas, Jose A. Rosales, and William Rosales.

On January 7, the Union sent to Respondent a letter by certified mail in which it noted the names of employees on the organizing committee. Copies of the letter were given to everyone on the committee and perhaps other employees. John Bazbaz testified that the Respondent did not receive this letter, testifying that it did not get the signature card which accompanies certified mail. I do not credit this testimony. Instead I find that it refused to accept the letter. The envelope in which the letter was sent shows that the Post Office made at least two attempts to deliver it. Company mail is received by Polytex Fibers, which sends it to U.S.A. Polymer. Bazbaz testified that Respondent was advised by counsel on or about February 3, 1995 not to accept certified mail from the Union to avoid a recognition request based on a card majority. I believe and find that assuming such counsel was given, it was given at the time of the first certified letter from the Union, whose name prominently is shown on the envelope. As will be discussed in connection with various of the alleged violations of the Act, Respondent had knowledge of the organizing campaign prior to January.

During the first 3 weeks of January, the Union secured signed authorization cards from about 58 or 59 of the 64 employees of Respondent who would be in the bargaining unit. Then, beginning January 27, the Respondent laid off about 29 of its employees. The General Counsel contends that the layoff was aimed at stifling the Union organizing effort and was the culmination of a number of threats and intimidating conversations the Respondent's supervisors had directed at employees during the campaign. Accordingly the General Counsel argues alternatively that the layoff itself was unlawful, or if economic justification existed for the layoff, the selection of employees to be laid off was discriminatory and unlawful.[4] Respondent contends otherwise. It asserts that it had no knowledge of any organizing activity until after the layoff. Several witnesses characterized the campaign as a quiet one, but would not agree that it was a secret campaign. The employees did not wear union buttons or other union insignia during the campaign, having been told by organizer Garza that they would be fired by the Employer if they wore them. Respondent contends that the layoff was economically motivated. John Bazbaz testified that with the exception of 2 months in 1994, the Company has not been profitable during its existence. According to Bazbaz, Respondent had to undertake some action to cure the economic problem, and that resulted in a layoff. According to the brothers Bazbaz, the decision to make the layoff was made in the first couple of weeks of January 1995. Though the evidence regarding how the number of employees to be laid off was derived is somewhat conflicting, at least one formula suggested was that they decided to reduce the Company's operating time by 30 percent. At the time of the layoff, the Company had about 64 nonsupervisory employees. It laid off 29 or about 45 percent of such employees.

After the layoff, some of the employees came to the Union office and informed the Union that they had been laid off. The Union then investigated to determine the reasons for the layoff and found that the remaining employees were fearful and would not talk to its representatives or return their phone calls. At least three union meetings were held after the layoff and with the exception of a handful of current employees of Respondent, were primarily attended by laid off employees. The involved union organizers were told by present employees that the layoff had instilled fear in their fellow workers. Since the layoff the Union has been unable to get any additional employees to sign cards. The organizers each testified that they had never before encountered a campaign where almost half of the work force was laid off during an organizing campaign. Following the layoff, the Union filed charges with the Board which resulted in the issuance of the first complaint.

The first complaint alleges that at various times during the campaign, certain of Respondent's supervisors committed violations of Section 8(a)(1) and (3) of the Act, primarily in conversations with employees. Additionally, it alleges that the layoff of about half of the employees in January 1995 was discriminatorily motivated and violated Section 8(a)(3) of the Act. Following the first hearing in this matter, held in June 1995, a second complaint was issued, the two complaints were consolidated and the new allegations were litigated at a hearing held in October 1995. The second complaint alleges that following the first hearing here, the Respondent committed certain Acts in violation of Section 8(a)(1), (3), and (4) of the Act, including threatening employees, reducing overtime to certain employees and laying off 10 additional employees in July 1995. Respondent denies all allegations that it committed the unfair labor practices alleged and asserts that the second layoff was the result of a decision to cease its polyethylene production for economic reasons. Respondent admitted the supervisory status of Issac Bazbaz, president of Z. L. Star, John Bazbaz, president of Respondent, Javier Guerrero, assistant to John Bazbaz, Luis Mendoza, plant manager, and Fernando Molina, Sergio Palacios, German Robles, Israel Zepeda, Cesar Portillo, and Augustine Garcia, plant supervisors. However it denies supervisory or agency status of a consultant named Carlos Hallatt and asserts that one of the alleged discriminatees, Lucio Aviles, was a supervisor and not a rank-and-file employee. Respondent further contends that one employee, Montes De Oca, was a guard and not a production employee. These issues with respect

[4] All of the employees laid off were employees who had signed union authorization cards prior to the layoff. Only five non-supervisory employees did not sign authorization cards. These employees were Hugo Barrera, Manuel Medrano, Antonio Suarez, Abraham Tobar, and Jose El Cid. All of these employees with the exception of El Cid are still employed by Respondent. These five employees were also unaffected in the July 1995 layoff.

to the status of Hallatt, Aviles, and De Oca will be resolved below before making findings with respect to the alleged unfair labor practices.

B. The Supervisory Status of Lucio Aviles and Carlos Hallatt and that of Montes De Oca as a Guard

1. Was Lucio Aviles a supervisor?

Lucio Aviles was one of the first employees of Respondent, having been employed by it at its inception. Aviles had previously been employed by Polytex Fibers and transferred to Respondent when it was formed. He performed electrical maintenance and electrical installation work for Respondent and also performed similar work on occasion for his previous employer Polytex Fibers and other of the Z. L. Star companies. He was active in the campaign and was one of the employee organizing committee members. He was one of the employees laid off on January 27 and is alleged to be a discriminatee. Respondent takes the position that he was a supervisor with the Company because, according to John Bazbaz, Aviles directed other electrical employees' activities. Bazbaz also testified that Aviles also planned installations, including deciding what materials were needed and then having the people under him perform the work. Bazbaz was able however to remember only one employee by name that Aviles ever supervised, a Miquel Perez, and could remember no specific jobs that Aviles had purportedly supervised. Bazbaz also admitted that no one can order materials without either his approval or that of his brother Isaac Bazbaz.

Aviles testified that he was an employee and was supervised by Carlos Hallatt. Hallatt is employed, according to Bazbaz, as an independent consultant to help solve critical maintenance problems and also to build and modify equipment. Bazbaz also admitted that Hallatt advised Aviles on a daily basis about what needed to be done as it related to electrical matters. Bazbaz testified that he advised Aviles of his supervisory status at the time he began working for Respondent, adding that he told Aviles that he was to supervise the people hired to work under him, to train these workers and direct them. He contends he gave Aviles the power to suggest that employees be fired and the authority to request that employees be hired and approve the hiring. According to Bazbaz, Aviles could request of him that overtime be approved and could recommend wage increases for employees working under him. The record contains no concrete examples of any exercise of any of these alleged powers by Aviles.

Aviles considers Hallatt to be his supervisor because he instructed him on a daily basis concerning what was to be done that day. Additionally, John Bazbaz told him when Hallatt was hired that he was his supervisor. Bazbaz did not tell him that Hallatt was a consultant and not an employee of Respondent. Aviles denied that any one ever told him he was a supervisor. In this regard he related a conversation he had with John Bazbaz and Hallatt in November. Aviles had a meeting with the two and complained to them about a deduction from his pay. Bazbaz told him it was a punishment for failing to answer his beeper. Bazbaz agreed that the deduction would cease after the pay period. Aviles salary had been increased because he performed work for other Z. L. Star companies, Super Bag, and Polytex Fibers. Hallatt then said that they wanted him to be a supervisor. Aviles said he did not want that position and refused to accept it. Hallatt then asked if he would be a lead man. Aviles said he did not want that either, he just wanted to continue doing his job. Bazbaz and Hallatt agreed to honor Aviles' wishes. Aviles denied he had any of the indicia of a statutory supervisor. Support for this position can be found in the testimony of Luis Martines.

Luis Napoleon Martines was employed as an electrician by Respondent in August 1994 and worked with Aviles. He testified that his supervisor was Carlos Hallatt. He was not told that Aviles was a supervisor. Hallatt told him when he was hired that he would be an electrician and work for him. Not only did Aviles not supervise his work, he occasionally told Aviles how to perform some electrician's duties, telling Aviles what to do and how to do it.

Further support for finding Aviles not to be a supervisor can be found from two other sources. First, Respondent uses accounting codes for its various departments, assigning the 900 code series to supervisors. Aviles was assigned a 700 code, the one for the maintenance department. Second, both Bazbaz and his assistant, Javier Guerrero, gave some rather unbelievable testimony regarding Aviles. Although Aviles was a longtime employee and had been given two raises in the fall of 1994, both Bazbaz and Guerrero called Aviles slow, undependable and incapable of performing electrical tasks that needed doing. This testimony came in defense of the decision to lay off Aviles and thereafter permanently eliminate the position of electrician at the Company. Respondent now contracts for electrical work that Guerrero cannot perform himself. This wholly unnecessary and unbelievable attack on Aviles competency belies much of their testimony about him and his position with the Company. Guerrero also testified in another context that no supervisor was laid off in the January layoff. This testimony also belies Respondent's position that Aviles was a supervisor.

Based on the credible evidence adduced and specifically crediting the testimony of Aviles over that of Guerrero and Bazbaz, I find that Aviles was simply an electrician and not a supervisor. As noted above, there is no evidence to support supervisory status except for the testimony of Bazbaz and Guerrero to the effect that Aviles was a supervisor and there is clear evidence that he was not. I do not credit the testimony that he possessed supervisory powers as no example of the exercise of such power was given and the evidence supplied by Luis Martines refutes such a contention. I also credit Aviles' testimony about his conversation in November with Bazbaz and Hallatt that clearly shows that he was not a supervisor.

2. Was Carlos Hallatt a supervisor or agent?

Carlos Hallatt has been employed for 18 years as a consultant by Instalaciones Anahuac, of Mexico City and is assigned by that company to provide service to Respondent pursuant to a consulting agreement. This assignment began about January 1994 and continues to date. Respondent pays $2000 per week, plus about $2000 a month in expenses for Hallatt's services. Hallatt calls himself an industrial technician and gives advice and direction for layouts and maintenance of the entire recycling system operated by Respondent. He has known the Bazbaz family for about 20 years and has previously done consulting work for them at companies they have owned in Mexico.

Hallatt did not deny the assertions made by Aviles and Martines that they were told that he was their supervisor and that he supervised their activity. Thus he does possess one of the criteria for determining supervisory status, that of independently directing the work of other employees. The only reason that this matter is an issue is whether a conversation Hallat had with Aviles on January 27 can be attributed to the Respondent. Be-

cause Hallatt was introduced to Aviles as his supervisor, I believe that Respondent cloaked him with authority to speak on behalf of management and thus, I find that Hallatt is at least an agent of Respondent within the meaning of the Act.

3. Was Montes de Oca a guard?

Bethuel Montes de Oca Mendoza worked for 3 years for Respondent until he was laid off in January. He testified that in the last part of 1994 and the first part of 1995, he worked on conveyors, feeding raw material into the grinders. An affidavit given to the Board by the witness states: "I would say as of September 1994, I worked guarding the door and checking on the parking lot and taking care of the dogs only." When asked repeatedly what he did after September 1994, Montes de Oca could not remember. He did not carry the employee code carried by most of the other employees who worked in the recycling process. The only other employee I could find who had the same code as Montes de Oca and who testified was a packer. In support of Respondent's position on this matter is the fact that after Montes de Oca was laid off, it employed an independent security agency to provide a guard.

I find that the evidence adduced with respect to the status of Montes de Oca is inconclusive on the issue of whether he is a guard. Clearly he was a production employee for several years. Thus for the purposes of this decision, I find that he was a production employee who apparently performed some functions that might be classified as those of a guard. I find that he should be treated the same as the other production employees laid off by Respondent.

C. The Alleged Unfair Labor Practices Committed by Supervisors Prior to the January 27 Layoff

As noted earlier, the complaint alleges that a number of Respondent's admitted supervisors engaged in conversations with employees prior to the January 27 layoff in which the employees were interrogated about their union activity, the union activity of fellow employees and were threatened with a variety of reprisals for engaging in such protected activity. The allegations, if established, also demonstrate Respondent's knowledge of the organizing campaign almost from its inception. Specifically the complaint alleges that Respondent violated the Act by:

7. Supervisor Augustine Garcia:[5]

(a) In mid-December, interrogating employees concerning their union activities.

(b) About January 25, interrogating employees concerning their union activities.

(c) About January 27, telling employees that they had been laid off because of their union activities.

(d) About January 27, telling employees that fellow employees were laid off because of their union activities.

(e) In early January, interrogating employees concerning the union activities of fellow employees.

(f) In early December, interrogating employees concerning the union activity of fellow employees.

(g) In early December, threatening employees with discharge if they supported the Union.

8. Supervisor Javier Guerrero:

(a) In late November, questioning employees as to whether they were going to continue to pass out union material.

(b) About January 27, told employees that the time they were on layoff status would give them the opportunity to consider their involvement with the Union.

(c) About February 2, told employees that their layoffs were because they were involved with the Union.

(d) Supervisor Javier Guerrero, about July 7, telling employees that they had been selected for layoff because of their support for the Union.

9. Supervisor Fernando Molina:

(a) About December 15, and at various times thereafter, interrogating employees concerning their involvement with the Union.

(b) About December 15, threatening employees with discharge for engaging in activities on behalf of the Union.

10. Supervisor Sergio Palacios:

(a) About January 5, interrogated employees concerning the involvement of fellow employees in the Union.

(b) About January 27, advising employees that had they identified the Union supporters to him, they would not have been laid off.

(c) About January 24, denying an employee assistance because he was believed to be a union supporter.

11. Supervisor Herman Robles:

(a) In November, interrogating employees concerning their union activities.

(b) In November, threatening employees by stating that if they were involved with the Union, they would be fired.

12. Supervisor Caesar Portillo:

(a) About mid-December, threatening employees with more onerous working conditions if they would not tell Respondent who was active on behalf of the Union.

(b) In mid-December, threatening employees with discharge if Respondent discovered who was supporting the Union.

(c) In mid-December, threatening employees with physical harm if Respondent discovered that they were distributing Union literature.

(d) About January 7, threatening employees with discharge if Respondent discovered that they were involved with the Union.

(e) About January 7, telling employees that if they did not like the way things were at Respondent, they should look for another job.

(f) About January 7, interrogating employees as to their union activities.

(g) About January 13, interrogating employees concerning their union activities.

(h) About January 13, threatening employees that if they did not like how things were going at Respondent, they should quit.

(i) About January 20, threatening employees with discharge because their names had been sent in a Union letter to the Company.

[5] The paragraph numbers used in this section relate to the paragraph numbers in the complaint.

(j) About January 20, threatening employees that if Respondent discovered that they were active on behalf of the Union, they would be fired.

(k) About January 20, offering employees a bonus if they would disclose the identity of union adherents.

(l) About January 24, threatening employees with discharge if they continued their involvement with the Union.

(m) About January 24, creating the impression of surveillance by telling employees that Respondent knew that they had attended Union meetings.

(n) About January 23, interrogating employees concerning the union activity of fellow employees.

(o) About January 25, threatening employees with discharge if they supported the Union.

Hereinafter, the evidence adduced with respect to the alleged prelayoff violations by supervisors will be discussed under subheadings for each involved supervisor. A number of conversations with or interrogations and threats by supervisors that are not specified in the complaint were testified about by the employee witnesses. Those conversations or interrogations which occurred before the January 27 layoff will be considered on their merits as Respondent's defense to these is simply that no conversations about the Union between management and employees could have occurred before the layoff as Respondent denies any knowledge of the union campaign until after the layoff. Under these circumstances, Respondent would not be denied due process as no investigation of these conversations is necessary. On the other hand, with one exception, conversations which are not alleged to be unlawful in the complaint occurring after January described by the employee witnesses will not be considered on the merits as Respondent was not given the opportunity to investigate the circumstances of these alleged conversations.

Supervisor Ausgustine Garcia

Supervisor Augustine Garcia asked employee Guadalupe Leal if he was in the union movement while he was working in December. Leal said that he was. Garcia said that he was not interested in the Union.[6]

Hugo Benavides, began working for Respondent in September 1994 as a grinding machine operator. About the middle of December 1994, Supervisor Augustine Garcia spoke to him while he was working. Garcia asked him if he was in the Union. Benavides replied that he was in the process of getting in the Union.[7]

In the latter part of January, Supervisor Garcia approached employee Nelson Chajon while he and Lucio Aviles were discussing the Union. Aviles left and Garcia asked him what they were saying about the Union. Chajon did not answer and Garcia asked why he did not want to tell him. Garcia left at this point.[8]

On January 25, Supervisor Garcia asked forklift operator Manuel Perez at work, if he was attending union meetings and Perez answered that he was not. Perez had attended such meetings, but feared he would be fired if he admitted it.[9]

On January 27, electrical employee Luis Martines had a conversation with Supervisor Garcia. Garcia told him, "Do you realize what happens to the suckers—all the stupid guys that are involved with the union? We kicked out the first sucker and you wait and see what is going to happen to the others." The witness responded, "We were going to get fired because we were fighting against injustice?" According to the witness, Garcia said, "We kicked out—we fired that shit, Jose Rosales, and we are going to continue with all the others." Garcia told him to wait, that they were going to see what was going to happen to them.[10]

Martines also testified that in about November, he spoke with supervisor Garcia while working at his job. Garcia approached him and said, "Aww, you know, quit this cocksucking maneuver or act. Quit this nonsense—stupid things. John Bazbaz, Javier Guerrero already know that you are the leader of this movement." The witness added that Garcia also told him to stop his involvement with the Union, because Bazbaz fired employees who tried to get the Union in. Garcia added that he knew that Martines was the leader of the movement and that Lucio Aviles was the second in command. Garcia then asked who were the other union supporters and when they were going on strike. The witness did not answer. Garcia then told him that the boss was not going to rest until he saw they were out of a job and that the employees were going to be sorry for organizing the Union.[11]

Employee Pedro Molgar testified that around January 30, he asked Supervisor Garcia why the employees had been laid off. Garcia told him they were laid off because of the problem they were causing the Company, identifying the Union as the problem.[12]

Supervisor Javier Guerrero

On January 27, Guerrero told Castro and another employee, Hugo Benavides they were being laid off because of a lack of material. Castro told him that the real reason for the layoffs was the Union. Guerrero responded by saying it is the policy or politics of John Bazbaz. Guerrero suggested that if he wanted to talk further to call his lawyer. Castro asked why and Guerrero told him "Because you are going to need it." Guerrero then laughed at him. Castro said this was not a joke and Guerrero said, "Take it as you wish."

Later that day, Castro encountered Supervisor Portillo, who said, "It has happened." Castro asked, "What are you talking about?" Portillo answered, "You got fired." Castro said, "You already knew." Portillo responded, "Yes." Castro said, "Thank you for your good help."

At a later point on the January 27, Guerrero went to Castro at the densifier where Castro was speaking with some other employees. He was accompanied by a security guard. Guerrero threatened the employees, saying, "Quit talking about that union. See what happened to (Castro). This could happen to you, too. If you don't leave, I am going to kick you out." Castro left.[13]

Employee Montes de Oca related a conversation he had in early 1995 with Supervisor Javier Guerrero. He was waiting to

[6] This testimony relates to complaint allegation 7(a), above.
[7] This testimony relates to complaint allegation 7(a), above.
[8] This testimony relates to complaint allegation 7(b), above.
[9] This testimony relates to complaint allegation 7(b), above.
[10] This testimony relates to complaint allegation 7(c) and (d), above.
[11] This testimony relates to complaint allegations 7(a), and or 7(f) and (g), above.
[12] I believe the correct date for this conversation was January 27, the date of the layoff. Molgar was not laid off until January 30. It was pointed out that in his affidavit to the Board, Molgar did not say that Garcia identified the Union as the problem causing the layoff. This testimony relates to complaint allegation 7(d), above.
[13] This threat is not alleged in the complaint, but is credited in any event for the reasons set forth later in this section.

give another employee some authorization cards to distribute. Guerrero asked him, "What the fuck are you doing with those cards?" Guerrero then told him that if he continued to distribute the cards, he would fire him.[14]

Lucio Aviles testified that around the beginning of January, 1995, while repairing an electrical problem with a fellow employee, Luis Martines, supervisor Javier Guerrero approached them angrily and put his hands on the panel that Aviles and Martines were working on. Aviles told him to calm down. Guerrero raised his hands in an agitated way and told Aviles to "quit the cocksucking attitude, because that is what you are. And that is what you are doing with the union."

Electrical employee Martines also remembered this occasion. He testified that Guerrero approached them in an angry manner and asked, "What the fuck we were doing there.?" They were performing electrical work on a panel. Guerrero tried to close and open the doors of the panel and Aviles told him to be careful because they had not finished repairing the panel. They had cut the electricity to the panel while they were repairing it. Guerrero said to "Quit all this shit. You [referring to Aviles] and those of the union will suck my prick. These are just cocksucking things." According to Martines, Guerrero was furious and he began to roll up the sleeves of his shirt and gestured at Aviles. The witness saw that Guerrero was angry and told Aviles to leave. He testified that Hallatt was observing this incident but did nothing.[15]

Luis Martines testified that on January 27, he was told to report to Guerrero.

Guerrero told him to sign a paper, but hid what the paper said. The witness said he could not sign without knowing what he was signing. According to Martines, Guerrero said, "I want to tell you the truth. This is a policy of John Bazbaz to fire all those from the union. This is why we are going to give lay-off to all of them." The witness asked why all the employees were being laid off when there was so much work to be done. Guerrero replied, "That is the boss' policy.[16]

Alejandro Blasio learned he was being laid off on January 27 when he arrived for work about 3 p.m. A supervisor, Fernando Molina told him to punch his timecard and report to Javier Guerrero. When he did so he met with Guerrero in the company of almost all of the employees on his shift, including Edgar Carrera , Jose Giron, and Nery Mendoza. In all about 8 to 10 employees were at this meeting. The witness described the meeting thusly: "Javier Guerrero was behind his desk. Everybody else was around him. I arrived; I was one of the last ones. I went in. He gave me an envelope, and he told me, 'We are giving you layoff because of a lack of work.' Guerrero gave him a letter. I opened the envelope. And Javier Guerrero told me, 'Sign the copy, give it to me, and keep the original.' And I said, Why is this? He said, 'Because there is no work, and so we are going to have a temporary personnel reduction.' And then at that time my workmate, Jose Giron, asked Javier Guerrero, 'Javier, why are they laying off or letting go everyone whose name appears on the letter of the organizing committee that the union sent to the company?' Javier Guerrero told him, 'That is not true, because Nery Mendoza's name does not appear.' And he pointed to another person whose name I don't recall, and he said that that person's name did not appear, either." "I told Javier Guerrero, 'Listen, what are we going to do?' He said, 'How is it possible that you are complaining to me if you are going to get pay for not working? Besides, you are going to have time to think about what you are doing.' And later on he said, 'This is nothing personal. I just take orders. But I want to give you an advice: Look well who is guiding you."[17]

On January 27, 1995, Nery Mendoza was laid off by Guerrero in the same meeting as was Jose Giron and Luis Martines. According to Mendoza, in this meeting Guerrero said they were being temporarily laid off at the direction of those above him. Jose Giron, who was also being laid off asked him why he was firing those employees who were on the list of Union supporters. Javier Guerrero said, "I don't remember what list are you talking about." Jose Giron said, "The list that the union sent to you." Guerrero responded, "I don't remember. Perhaps it didn't get here; wasn't delivered by the mail. I haven't seen it. Besides, Nery and Mauro are not on the list."[18]

Mario Perez was laid off on January 27 in a meeting held by Guerrero with the witness and fellow employees Edgar Carrera, Nery Mendoza, Mauro Moran, and Jose Giron. Guerrero told them that they were being temporarily laid off because of economic reasons and would be recalled if the situation resolved itself.Giron asked if they were being laid off because of the list of union (supporters), and Guerrero answered that he did not know anything about the Union. He then commented that Nery and Mauro were not on the list.

Jose Giron was laid off in a meeting with Guerrero and fellow employees Mario Perez, Nery Mendoza, Edgar Carrera, Alejandro Blasio, and Mauro Moran. Guerrero told the employees they were being laid off because of lack of raw materials. The witness asked Guerrero why they were letting go only those who appeared on the list of the organizing committee of the union. Guerrero named two employees being laid off and noted they were not on the list. These two employees were Nery Mendoza and Mauro Moran. Guerrero added that he knew nothing about the Union.

Lucio Aviles went back to the plant 2 days after the layoff and asked Guerrero for work. Guerrero told him that he did not know, but that a lot of high density material had arrived. He added that he would have to wait until Bazbaz arrived to see what he had planned. Aviles then started to leave and Guerrero said, "You see what you got for being involved with the union?"[19]

Supervisor Fernando Molina

Felix Jovel Palacios was employed by Respondent until he was laid off and was supervised by Sergio Palacios. In the last part of 1994 and the first part of 1995, he was asked by supervisors what was going on about the Union and he would tell them he did not know. One of these supervisors, Fernando Mo-

[14] This testimony is related to complaint allegation 8(a), above.

[15] This testimony was not alleged to be a violation of the Act in the complaint. However, for the reasons set forth later in this section, I credit the testimony and find that Guerrero did threaten Aviles and Martinez in violation of the Act.

[16] This testimony relates to complaint allegation 8(c), above.

[17] Luis Martinez went back to the plant to pick up his final paycheck on January 30 or 31. He got the check and went to the parking lot with some other laid-off employees. According to Martinez, Bazbaz came out and told a security guard to get the men out of the lot, he did not want to see them on his property.

[18] The testimony in the preceding three paragraphs relates to complaint allegation 8(b), above.

[19] This testimony relates to complaint allegation 8(c), above.

Molina, around the beginning of December 1994, asked him what was going on and the witness said he did not know.[20]

Employee Leonel Campoverde worked for Respondent for 3 years, until he was laid off in January 1995. His supervisor was Fernando Molina. Campoverde testified about a conversation he had in the Company dining room with Molina together with fellow employee Marco Posadas and two others. According to Campoverde, Molina said: "if we were going to think about the union—belong to the union, for us to do it well because otherwise they were—we were going to fuck up." Molina indicated in this conversation that he knew the four employees were Union supporters.[21]

Supervisor Sergio Palacios

Lucio Aviles testified that on January 27, he and fellow employee Luis Martines were approached by Supervisor Palacios who told them that he had seen a list possessed by Javier Guerrero that contained the names of employees who were going to be fired because of their support for the Union. [22]

Supervisor German Robles

Employee Nelson Rodriquez testified that the day before he was laid off, Robles asked him if he had signed a paper for the Union, adding that if he had he would be fired.[23]

About a month after the layoffs occurred, Juan Torres, a current employee, had a conversation with Supervisor Herman Robles. Robles told him that "[the] union was for lazy people and that I was going to be sorry being there—that I was going to regret being there, that the union was going to take away half of my check." The witness testified that Robles asked him if he were in the Union.[24]

Rudolfo Bocanegra began working for Respondent in November 1994, and was employed in packing. His supervisor, Herman Robles, spoke to him about the Union on or about January 25, 1995. Robles told him that he knew that the witness and another worker, Camilio Ramirez, were in the Union and that they were going to fire them. [25]

In November, Nicolas Chajon, a densifier operator, was working at his machine when Supervisor Herman Robles came to him. Robles asked him if he belonged to a union. Before Chajon answered, Robles said that he knew Chajon belonged to the Union. Robles continued by telling Chajon that the Union was a waste of time and what Chajon was going to get was fired. Chajon countered that the Union was the benefit of all employees. Robles said, "Then you belong to the Union."[26]

Supervisor Cesar Portillo

Mario Perez began working for Respondent in December 1993 and was employed as an extruder operator. His supervisor was Cesar Portillo. The witness was a member of the organizing committee. In the last part of November 1994, Perez was approached in the company dining room by Supervisor Portillo. The witness and some fellow employees asked Portillo why the Company had discharged another employee. Portillo said that the employee had been absent without calling one day and was discharged for that. The witness then asked why the Company did not call the employees on days they have no work for them rather than having the employees come to work and then be sent home. Portillo responded that he was not interested, even less interested as he knew the employees were associated with the Union.[27]

Forklift operator Nery Mendoza testified that in mid-December, he was checking the oil in the forklift, when Cesar Portillo arrived. Portillo told him to tell him who were the leaders of the union. Portillo continued, "Because if you don't tell me who are the leaders or the bosses, I am going to get you down from this shitty forklift and I am going to send you back to the densifier so you can screw yourself like before. So you think well about it, because it is going to affect your job." Another employee, Alejandro Blasio was in the vicinity when this conversation took place.[28]

Alejandro Blasio began working for Respondent on November 7, 1994, having been hired by Javier Guerrero. He was a densifier machine operator and was supervised by Cesar Portillo. He described a conversation about the Union he had with Supervisor Portillo in January. He was working at his machine and another employee Nery Mendoza was nearby. He described the conversation: "On that occasion, I was outside my machine. The supervisor, Cesar Portillo, came by, and he told me that he already knew that I was mixed with this thing of the union. And the worst thing was that my name was on the list of the organizing committee. And he was not a stupid guy, that everyone whose name would be on the list that the organizing committee sent to the union, we would be the first ones to be kicked out or let go to the street. After that, he told me, 'but if you want to cooperate with us, it could be a bonus for you.' He told me, 'Think about it.'"[29]

Mendoza also noted another instance of a threat by Portillo. About the middle of December, Supervisor Portillo approached Mendoza and fellow worker Edward Carrera. Portillo asked Mendoza if he "knew who in the hell was distributing papers of the union in that company." The witness said he did not know. Portillo then threatened both men with discharge if he learned they were distributing papers for the Union inside the Company.[30]

[20] This testimony relates to complaint allegation 9(a), above.

[21] This testimony relates to complaint allegation 9(a) and (b), above.

[22] There was no testimony elicited in the hearing supporting the complaint allegations regarding Palacios prior other than those relating to events in June 1995. I however credit and rely on the testimony of Aviles set out above to establish a violation of Sec. 8(a)(1).

[23] This testimony relates to complaint allegations 11(a) and (b) above, though the dates are not the same.

[24] There is no complaint allegation to support this alleged interrogation and as it allegedly occured after Robles admittedly gained knowledge of the union campaign is in a different posture from those interrogations taking place before January 27. For this reason and because it is cumulative of other similar interrogations, I will not base a finding of a violation on the testimony.

[25] This alleged threat is not contained in the complaint, but is relied on to find a violation of Sec. 8(a)(1) because it occurred prior to the January layoffs and is closely related to other similar threats made by supervisors.

[26] This testimony relates to complaint allegations 11(a) and (b), above.

[27] This threat is not alleged in the complaint, but is credited and a violation found based on this testimony for reasons set forth later in this section.

[28] This testimony relates to complaint allegation 12(a), above.

[29] This testimony relates to complaint allegations 12(I), (j), (k), (l), (m), and (n), above.

[30] This testimony relates to complaint allegation 12(b), above.

Jose Americo Rosales began working for Respondent in April 1991 and worked as a washing machine operator until he was laid off in January 1995. During the first week of January, he had a conversation with Supervisor Cesar Portillo. at the plant at 6:45 in the morning. Another worker, Oscar Godines was present during the conversation. Rosales testified that Portillo asked him if he were the head or the boss of the union movement. Rosales told him that he did not know why he was asking him that. Portillo responded, "Don't play the fool with me. That he already knew why he was asking me that." Rosales then said the was cooperating with the campaign because there were no company benefits for employees and that it was a fair cause. Portillo continued, telling Rosales that if he continued to (support the Union effort), he was "going to send me to hell. Because the company was not going to allow that. That the company would not allow this thing about unions." Rosales responded that "we were fighting for a just cause. And not only me but possibly all the workers were going to cooperate." Portillo repeated again that "if I would continue doing those shits [supporting the Union], he was going to take my job. He was going to fire me."[31]

Oscar Godines worked for Respondent from 1992 until he was laid off in January. He began his employment working on the grinder and was working with the washing machines at the time of layoff. His supervisor for the last part of his employment was Cesar Portillo. About mid-January, while at work, Godines went to look for Luis Castro. He found him talking with Supervisor Portillo, who was angrily telling Castro to quit talking to people about the Union because they were going to be fired or their jobs would be taken away from them. Godines heard Castro respond that the reason why the people were getting organized was because they were not happy with the safety of the working conditions and that there was no reason for the conditions. At this point Portillo saw Godines and said, "Oscar, you also shouldn't be surprised if, one of these days, I fire you, because it is known that you are with this thing of the Union, also." Portillo then told Castro that John Bazbaz did not need anyone to tell him how to run his Company.[32]

On January 24, 1995, Mario Perez was working at his machine with fellow employee Jose Giron. Supervisor Portillo came to the witness' machine and said, "Already I learned that all my shift attended the meeting of the union, but they are peeling my penis." Giron started to comment but was stopped by the witness. The witness considered Portillo's comment to be a provocation as he consider the words used to be fighting words. A few days before, the employees on the shift had attended a union meeting. Jose Giron testified about this threat. He remembered that Portillo approached the two men and asked, "What the fuck are you doing here?" The witness said he was looking for trash containers. Portillo said, "I already know that all my shift is in the syndicate or union. But if I know that you are one of the organizers, I want to get you out and I am going to kick you out of the company."[33]

Alejandro Blasio had another conversation about the Union with Portillo on January 24. This conversation took place on his lunch break in the Respondent's dining room. He was with fellow employees Edgar Carrera, Nery Mendoza, and Jose Giron. The employees were talking about the Union when Portillo arrived. Carrera asked Portillo for a helper on his machine and Portillo told him that he was not going to give him a helper, because he was one of the persons involved with the Union. Portillo continued saying, "I know that that thing about the Union is to help drunkards and assholes or lazy [persons] and that we were not going to look at him with the sucker's or fool's face." "That all of us who were involved with the Union were going to be sent to hell." The witness stated that this means getting fired or terminated.

Nery Mendoza remembered this confrontation and testified that Portillo approached the group of employees and said, "that shitty, or that shit of a union, was for the drunkards and lazy people. And those kind of people were the kind of people the union would protect. And if we had in our heads those ideas of the Union, you are better off to take those shitty ideas from your head because it is going to affect your jobs and you are going to be damaged by it."[34]

Cesar Portillo talked with Luis Castro on January 23, 1995, with Portillo asking him how the employees were doing with the Union. He then said, "Quit talking to the Union. I will get you a job as a supervisor, a salary raise, and I will talk to Mr. John Bazbaz." The witness responded, "If Mr. John Bazbaz is really as you say, so considerate, tell him to sit with us and let's negotiate a contract." Portillo said that Bazbaz would not take advice from anyone. Castro then told Portillo that he was not the only one, that he had people that would support him from all the different shifts. He then gave Portillo the names of all the employees on the organizing committee, naming specifically, Oscar Godines, Alejandro Blasio, Jose Giron, Lucio Aviles, Luis Martines, Edgar Carrera, Mario Perez, Miguel Perez, and himself. Portillo responded that he knew of the 10 union supporters and he knew some other supporters as well. Portillo advised him to stop talking about the Union because it would harm the interests of the Company, which could not pay increased wages and benefits to the employees Castro said that the employees were not asking for something the Company could not give, but only what was necessary according to law. Portillo responded that the only thing that was going to happen was that the Company was going to fire them.[35]

Supervisor Israel Zepeda

At a point in December, Supervisor Zepeda had a conversation with employee Montes de Oca in the company dining room. Zepeda told him that if he learned that he was taking photographs (of the Respondent's facility) for the Union, he was going to fire him. At about the same time, Zepeda interrogated employee Guadalupe Leal, asking him what the Union was promising employees.[36]

Agent Carlos Hallatt

On January 27, Hallatt approached Lucio Aviles while he was working and asked if he were involved with the Union. Aviles said he was. Hallatt said he had known for 2 months. Aviles then told him that to organize for the Union was a noble thing, that he did not feel he was offending anyone, that to talk

[31] This testimony relates to complaint allegations 12(d), (e), and (f), above.

[32] This testimony, as well as the testimony in the preceding paragraph relates to complaint allegation 12(d), above.

[33] This testimony relates to complaint allegation 12 (m), above.

[34] These testimony in the two preceding paragraphs relates to complaint allegations 12(l) and (m), above.

[35] This testimony relates to complaint allegations 12(n) and (o), above.

[36] These interrogations and threats are not alleged in the complaint, but I credit the two witnesses testimony and find that the two incidents violated the Act.

about the Union was to talk about respect and that it was necessary to organize the Company. Aviles told Hallatt that 3 years ago, the employees had a meeting with John Bazbaz at the Company where the employees talked about benefits, salaries, vacation time, and holidays. At the meeting Bazbaz told the employees that by law they had no right to anything, adding that whoever wanted to continue with the Company could do so, and whoever didn't like it that the doors were very wide. Aviles then added, that through the years a seed had been planted and that John Bazbaz was harvesting that seed. After some further conversation, Hallatt told Aviles that he was asking him all of this because he had gone to John Bazbaz' office and that he had seen a list with names, on which he was able to see the names of German Joya, Miquel Molina, and Luis Martines. This was a list of employees who were going to be fired because of their support of the Union.[37]

Respondent's defense to this overwhelming mass of evidence of widespread unlawful interrogations and threats is simply to deny knowledge of any union activity until after the January 27 layoff and thus a denial that any such conversations did or could have taken place. Its involved supervisors all testified, as if by rote, that they learned of the campaign in the weeks after the layoff, most of them learning of it from John Bazbaz. Respondent's Exhibit 10, a flyer that was distributed to employees on March 30, 1995, is relied on by Respondent to support its secrecy theory.

The first page of the exhibit reads: "There is no secret any more. News: The Local of the ILGWU is on it. The secret is out. Everything is known. The secret is outside. The company, U.S.A. Polymer, was accused by the attorneys of the Government of the United States of North America of violating the rights of our work mates. After a complaint was submitted by the union ILGWU, we—your work mates—will never stop fighting for your rights or ours. If you, my friend, have not joined the fight for justice and benefits in employment for us and our family, go on. Go ahead and do it. If you have a question or you have a problem, call us at this number: 349–8860. Organizing committee of U.S.A. Polymer. America works better when we say, Yes, to the union. Union, Yes."[38]

The flyer also invited employees of Respondent to a picnic held by the Union. According to Aviles, several laid-off employees did attend, but no present employees showed up, though invited. The flyer announcing the picnic reads: "Invitation to a celebration. Employees of U.S.A. Polymer, Incorporated, and their friends are cordially invited this Sunday, April 9, 1995, at 3:00 p.m. until 6:00 p.m. at the office of Ganno [phonetic] on 6006 Villareal Boulevard, Houston, Texas. If you need information, please call telephone number 349–8860. Note: This invitation does not include supervisors or guards. Organizing Committee of U.S.A. Polymer, Incorporated."

I do not credit this defense. As noted earlier, I believe that Respondent refused to accept the January 7 letter from the Union because it feared that it would have to recognize the Union if it accepted the letter. I agree with the Charging Party on brief that the testimony of employees Blasio, Mendoza, Perez, and Giron about their meeting with Javier Guerrero on January 27 proves that Respondent knew of the campaign and the identity of the members of the union organizing committee. As related by each of these employee witnesses, in response to their inquiry of Guerrero as to why he was laying off only the union supporters, Guerrero denied knowing who was in the union campaign. He then stated that he knew that employees Nery Mendoza and Mauro Moran were not on the list of members of the organizing committee. Obviously, Guerrero could not know who was not on the list unless he knew who was on the list.[39] Additionally, from the standpoint of demeanor of the various supervisors and other management witnesses, I did not find their testimony on the question of when they learned of the union campaign to be credible. They gave this testimony almost as if they had memorized answers. In a 4-month campaign in a relatively small plant where almost all the production employees were active supporters of the Union, attending union meetings and talking about the Union among themselves, I believe it virtually impossible for knowledge of the campaign not to have come to the attention of management and find that it did, prior to the layoff. Further, to believe the simple denials of knowledge by the supervisors, one would have to believe the numerous witnesses who testified credibly about conversations with those supervisors were making up their testimony out of whole cloth. I find this scenario to be impossible given the detail and emotion displayed when the conversations were related.[40]

The interrogations and conversations set out above all are violative of Section 8(a)(1) of the Act in that they clearly tend to restrain, coerce, and interfere with employees' exercise of their Section 7 right to organize and support a union. Cumulatively, these interrogations threaten employees with discharge, with loss of benefits, more onerous working conditions, physical harm, and other, unspecified reprisals for engaging in union activities or supporting the Union. They additionally give the impression of unlawful surveillance of union activity. One or more of the interrogations combined the threat of discharge for engaging in union activity with the promise of a benefit if the employee did not engage in such activity.[41] *Wellstream Corp.,* 313 NLRB 698, 702 (1994); *Rossmore* House, 269 NLRB 1176 (1984); *Airport Distributions,* 280 NLRB 1144 (1986); and *Farr Co.,* 304 NLRB 203 (1991).

D. Was the Layoff of January 27 Unlawful?

Commencing on January 27 and continuing through January 30, Respondent laid off the following 29 employees:

Miguel Alanis	Mario Aparicio

[37] I do not find a complaint allegation concerning this conversation, but consistent with my ruling, do find it to have happened, and it constitutes a violation of Sec. 8(a)(1).

[38] Organizer Medrano testified that the secret was the fact that Respondent had engaged in unfair labor practices contrary to what Respondent was telling others.

[39] Nery Mendoza was on the list, and Moran was not. This is not important. What is important is that he knew of the list at a time when Respondent asserts no knowledge of the campaign whatsoever.

[40] I have attempted to resolve all relevant credibility conflicts in this record. If there is an unresolved conflict between the testimony of one of Respondent's employees and one or more of its supervisors, I credit the testimony of the employee. I believe that Respondent's supervisors would say anything that would favor Respondent and deny anything adverse to Respondent, regardless of the truth.

[41] I have found numerous violations of the Act committed by supervisors as alleged in the complaint and not alleged in the complaint. The violations found to have been committed fall into the categories summarized immediately above. There is evidence to support findings of additional unpled violations of Sec. 8(a)(1), (see Charging Party's Briefs for examples); however, these findings would be merely cumulative of findings already made, and made on clearer evidence. Thus, as I do not believe it serves any useful purpose, I will not make cumulative findings on any unpled violation other than the ones I have dealt with.

Lucio Aviles	Hugo Benavides
Alejandro Blasio	Rodolfo Bocanegro
Edgar Gerardo Carrera	Luis Castro
Nicholas Chajon	Elias Escobar
Julio Hector Garcia	Jose Giron
Oscar Godines	German Joya
Luis Martines	Pedro Molgar
Nery Mendoza	Miguel Molina
Bethuel Montes de Oca	Mauro Moran
Walter Jose Orellana	Felix Jovel Palacios
Manuel Perez	Miquel Angel Molina
Mario Perez	Nelson Rodriquez
Jose Rosales	Lionel Campoverde
Noe Ramirez	

The test for determining whether such an adverse employee action is discriminatory and unlawful is set out in *Wright Line,* 251 NLRB 1083 (1980). Therein the Board held that in such cases, the General Counsel must make a prima facie case on the issues of employer animus, the existence of protected activity and the employer's knowledge of that activity. Proof of these elements by the General Counsel warrants at least an inference that the employees' protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act has occurred. The employer may rebut the General Counsel's prima facie case by showing that prohibited motivation played no part in its actions. If the employer cannot rebut the prima facie case, it must demonstrate that the same personnel action would have taken place for legitimate reasons regardless of the employees' protected activity. In this regard, the employer has both the burden of going forward with the evidence and the burden of persuasion. It is not enough to articulate a legitimate nondiscriminatory reason. The employer must affirmatively introduce evidence to persuade the Board that the challenged action would have taken place regardless of the employees' protected activity and the employer's antiunion animus.[42]

In the instant case the General Counsel has clearly made a prima facie case of unlawful motivation. In the previous section of this decision, I have found that Respondent engaged in numerous violations of Section 8(a)(1) of the Act, including threatening to lay off or discharge employees for engaging in union activity. The credited testimony of several witnesses reflects both knowledge of the activity by the Respondent and the assertion that the layoff was in retaliation for union support.[43] The timing of the layoff, coming shortly after the employees signed authorization cards and the letter naming the organizing committee was sent to Respondent also strongly supports the General Counsel's position.

In the face of the very strong presentation by the General Counsel, Respondent has offered two defenses. The first of which, lack of knowledge of the union activity prior to the layoff, I have already discredited. The second defense is that the layoff was motivated by economic factors and would have occurred regardless of antiunion animus and knowledge of the employees' protected activity.

Prior to the January 1994 layoff, Respondent had only been profitable for 2 months in its history. It introduced an exhibit which reflects its economic performance from January 1994 through June 1995.[44] The exhibit reflects:

Statement of Income

January 1994—June 1995

Month	Sales $	Operating Expense	Income (Loss) $
Jan 94	395,012	$440,724	($45,712)
Feb 94	364,584	405,193	(40,609)
Mar 94	379,904	421,238	(41,334)
Apr 94	352,566	406,030	(53,564)
May 94	241,254	365,226	(123,972)
Jun 94	322,419	389,029	(66,610)
Jul 94	320,782	325,648	(4,866)
Aug 94	421,449	505,925	(84,476)
Sep 94	541,303	527,696	13,607
Oct 94	577,971	560,484	17,487
Nov 94	633,803	647,421	(13,618)
Dec 94	537,913	618,174	(80,261)
Jan 95	492,774	497,510	(4,736)
Feb 95	464,887	500,851	(35,964)
Mar 95	599,421	622,021	(22,600)
Apr 95	417,176	441,164	(23,989)
May 95	368,930	380,415	(11,485)
Jun 95	216,452	240,527	(24,075)
Totals	$7,648,600	$8,295,277	($646,677)
Correction of previous Accruals Corr.	(68,009)		68,009
Totals $	7,648,600	$8,227,268	($578,668)

A large part of the loss shown by the Company for December was caused by a very large accelerated depreciation charge for equipment purchased in 1994. Depreciation of equipment, which had been about $5000 monthly, was increased to $50,000. In the following 3 months, depreciation was carried at about $10,000 per month.

Both John and Issac Bazbaz testified about the decision to lay off employees. They do not contend that losses per se caused the layoffs. Rather, they took two positions with respect to raw material problems that they say forced the layoff. First, John Bazbaz testified that Respondent had difficulty finding raw stock for the HDPE production because of intense competition for raw materials.[45] This was somewhat modified in later

[42] *The Developing Labor Law*, Third Edition, 1992.

[43] For example, Luis Martinez testified that on January 27, he was told to report to Guerrero. Guerrero told him to sign a paper, but hid what the paper said. The witness said he could not sign without knowing what he was signing. According to Martinez, Guerrero said, "I want to tell you the truth. This is a policy of John Bazbaz to fire all those from the Union. This is why we are going to give layoff to all of them." The witness asked why all the employees were being laid off when there was so much work to be done. Guerrero replied, "That is the boss' policy."

[44] This exhibit was updated at the October hearing to show performance in the second quarter of 1995. It was also corrected to reduce accruals in the amount of $68,000 previously charged against the first quarter 1995 earnings. This reduction in acrruals would make the first quarter marginally profitable.

[45] Vladimir Ivanov is a chemical engineer and was the quality control manager for Respondent from November 1992 until his permanent layoff in September 1995. With respect to the matter of HDPE production, he testified that there are differences in quality and type of raw materials which affect the type and quality of finished HDPE. Respondent's customers have varying specifications for the finished product

testimony by both John and Issac Bazbaz to the position that Respondent had difficulty in securing sufficient raw material for HDPE production at a price that would allow them to process it and make a profit. The Bazbaz testified that they initially determined that the layoff was to be temporary. The General Counsel noted that in a position paper filed in February 1995, in response to the RC petition filed by the Union, the Company advised the Board that it was planning to significantly increase the work force. Bazbaz testified that at that time and for several months previously, the Company was engaged in the installation of a conveyor system to automate and increase production of HDPE at a lower cost per pound produced.[46] According to Bazbaz the increased production did not occur because the market conditions affecting its ability to profitably process and sell HDPE did not improve. Respondent introduced its exhibit 2 which reflects the rapid rise in HDPE raw stock cost as well as similar figures for the polypropylene raw stock. This exhibit reflects:

Monthly Average Cost Per Pound of HDPE and Polypropylene

HDPE

Month	Pounds	Cost	Cost per Pound
Jan 94	593,824	47989	0.080813507
Feb 94	593,908	57094	0.096132734
Mar 94	1,453,444	132851	0.091404278
Apr 94	838702	76008	0.090625753
May 94	870246	93239	0.107140969
Jun 94	948712	100676	0.106118611
Jul 94	1,073,786	105397	0.098154567
Aug 94	1,611,808	183802	0.114034674
Sep 94	1,110,438	144068	0.129739796
Oct 94	1,229,140	221428	0.180148722
Nov 94	1,546,989	270206	0.174665754
Dec 94	1,545,954	313037	0.202487914
Jan 94	1,073,110	240562	0.224172732
Feb 95	959,781	235205	0.245061128
Mar 95	1,067,108	276313	0.258936302
Apr 95	1,018,775	272958	0.267927582
May 95			
Jun 95			

Polypropylene

Month	Pounds	Cost	Cost per Pound
Jan 94	565229	41648	0.07368341
Feb 94	181621	11420	0.06287819
Mar 94	223900	12057	0.05384993
Apr 94	140870	10509	0.07460069
May 94	268613	18266	0.07172400
Jun 94	210595	14272	0.06776989
Jul 94	413774	25297	0.06113723
Aug 94	698411	35366	0.05063563
Sep 94	342100	31455	0.09194679
Oct 94	430454	66016	0.15336365
Nov 94	338822	41473	0.12240350
Dec 94	208113	18658	0.08965321
Jan 95	469554	55027	0.11718992
Feb 95	300550	42934	0.14285143
Mar 95	709802	88966	0.12533917
Apr 95	224677	23773	0.10580967
May 95			
Jun 95			

Respondent also introduced its production figures for both types of product it processes by month for the period January 1994 through June 1995. This exhibit reflects:

Monthly Production of HDPE and Polypropylene

Month	HDPE	PP	Cost per Pound
Jan 94	988900	206800	1195700
Feb 94	1009800	232000	1241800
Mar 94	1193500	346500	1540000
Apr 94	990000	393800	1383800
Month	HDPE	PP	Cost per Pound
May 94	1024100	325600	1349700
Jun 94	740300	518100	1258400
Jul 94	1321100	363000	1684100
Aug 94	1133000	442200	1575200
Sep 94	1072500	325600	1398100
Oct 94	1089000	438900	1527900
Nov 94	1197900	617100	1815000
Dec 94	1097800	401500	1499300
Jan 95	793000	583000	1376000
Feb 95	614100	502900	1117000
Mar 95	582000	407600	989600
Apr 95	170800	683900	854700
May 95	677739	780862	1458601
Jun 95	301218	540499	841717

As can be seen from the foregoing exhibits, the HDPE raw material prices doubled June 1994 to January 1995. According to the Bazbaz brothers, because of these escalating raw material prices, it was decided in mid to late January to reduce operating time or production by about 30 percent, primarily on the HDPE

made by Respondent, which call for different types and quality of raw materials. Thus, there are times when Respondent may have a substantial inventory of raw materials, but not have exactly the right material to produce what its customers are asking for. This problem is compounded by the need to purchase raw materials at a price that allows profitable production, which was difficult in the market for raw materials that existed at the time of the layoff. He also testified that Respondent cannot switch from running one kind of material to another easily. It requires cleaning of the equipment and resetting it for a new application. The Company needs to run its equipment virtually non stop to produce enough product to be profitable. Lack of proper raw mateials causes the shut down of the operation, leading to losses. He in effect disowned Respondent's Exhibit 2 which gives volumes of raw material purchased, saying that he would have to have a detailed breakdown to the material in inventory and the orders the Company had at the time, to see if it had the correct materials on hand to produce the kind of product its customers wanted at the time. Ivanov admitted that Respondent could use whatever inventory it had at any particular time to produce inventory of finished product to meet future demands for the product and thus avoid down time. Ivanov testified there are problems with this approach, one being price and the other being the unpredictability of its incoming orders for finished product.

[46] All work on this conveyor system ceased in or about May 1995, when a decision was made to cease production of HDPE.

production line.[47] Support for their decision to have the layoff, though not necessarily for the timing of the layoff, was given by an expert witness called by Respondent.[48] He gave a thorough picture of the polyethylene or HDPE recycling industry and the forces driving the industry over the last year. This expert witness was Michael Kopulsky, He is the founder and CEO of Envirothene, Inc., of Chino, California, which is a recycler of postconsumer high-density polyethylene. It produces a postconsumer recycled-content pellet as does Respondent. Envirothene has been in business since October 1990.

Kopulsky testified that he regularly studies the market conditions in the post-consumer recycling area as part of his job. He obtains information on this subject through plastics industry periodicals, such as *Plastics News* and *Modern Plastic.* He also reviews the waste industry periodicals, "Waste Age," and "Recycling Today," as well as a service called ISIS (phonetic), which provides polyethylene industry information. He additionally has conversations with product packagers, including Proctor & Gamble and Lever Brothers, who give him an indication as to the consumer base and where the market is going. Kopulsky's company supplies the companies who make bottles and other containers for Proctor & Gamble and Lever Brothers.

Kopulsky has written many articles on the subject of postconsumer recycling and the market conditions affecting this business for *Plastics News* and other publications. He has spoken on the subject on numerous panels and before a number of seminars. He is familiar with Respondent as they are both recyclers of postconsumer plastics in different regions of the country. The two companies do not ordinarily come across each other because the general rule in recycling is that if you venture more than 5 to 700 miles away from the plant, the freight costs become prohibitive to selling to other marketplaces. However, he has in the past subcontracted work to Respondent that was to be delivered outside Envirothene's geographic market area and inside the market area of Respondent.

Kopulsky testified that postconsumer recycling emerged in the late 1980s, 1989, and its viability, in his opinion, is still yet to be proven. He does not know of any post-consumer recycler who is doing well right now. What triggered his investment in the postconsumer plastics area was the January issue of *Time Magazine*, which made evident for him that the paper industry had a recycling infrastructure; the aluminum and the glass industry had recycling infrastructures, and the plastics industry players who were primarily petrochemical companies had not established an infrastructure and had no desire to establish a recycling infrastructure.

Hence, a cottage industry of postconsumer plastics recyclers started to emerge in early 1990, late 1989. One of the problems facing the producers in the industry is finding equipment that will do the processing efficiently and with good quality. There was and still is no standard equipment made that will do the involved task well. It took from 6 to 9 months from installation to work out the problems with the equipment and achieve both efficiency and quality. A producer of HDPE constantly strives for a balance between quality and quantity. This goal was affected by the quality of raw material being processed. Certain postconsumer HDPE products are of different grades of high-density polyethylene and often contaminants were supplied in the raw material.

The other major problem facing the new industry was finding a market for its product, as most users of polyethylene were used to using virgin product and were adverse to the idea of using recycled HDPE. Thus Kopulsky and others introduced legislation in California to require use of a percentage of recycled product in the manufacture of new HDPE products. When this legislation passed in California and Oregon, it had a dramatic effect on demand. Certain large users of such products, including Proctor & Gamble and Clorox, opted not just to use the mandated 25 percent recycled material for the States passing such legislation, but to use the recycled material in all of their containers. This decision created a demand that far outstripped the availability of recycled material in the nation. As a consequence, the waste industry, which collected and sold the raw materials to the recyclers, sensed the shortage and started hiking the price of raw materials on a daily basis. This created two problems for the recyclers. Their customers had a practice of demanding 30 days' notice of price hikes from virgin material suppliers, which practice they applied to the recyclers. Second, the price for recycled material was in competition with the price of virgin material. The recyclers had experienced raw material prices from 1991 through June 1994 of 10 cents a pound, which would be $200 a ton. This increased to $700 a ton in the last quarter of 1994.

Kopulsky estimated that about 50 percent of the pure recyclers, like his company and Respondent, fail. Other recyclers, who use the material they recycle to manufacture products such as plastic lumber themselves, fail at a higher rate. According to Kopulsky, the key to surviving is familiarity with the marketplace and processing efficiencies. It takes processing expertise to make it work, because recyclers are constantly getting pressures from two mature industries: the plastics product manufacturers or packagers on the top end who are the recyclers customers and on the other end, the waste industry who are constantly negotiating to get the highest price for the raw materials they collect. This price compression, combined with the plastic industry's 30-day price notice practice, caused Kopulsky's company and others like it to take major losses. In October 1994, Envirothene, Inc. was in a break-even situation, but since that time, the compression in the price spread between the raw materials and the processed HDPE, which Kopulsky believes is an aberration and not a permanent condition, caused Envirothene, Inc.'s spread to move from 18 to 20 cents per pound down to 14 or 15 cents a pound. This raised the cost of goods sold percentage from its norm of 70 percent to 94 to 96 percent, where it is impossible to make a profit.

According to Kopulsky, this compression affected every post consumer plastic recycler. Most decided to scale back production until the supply demand ratio fell into place and a profit

[47] This 30-percent cut in operating time inexplicably resulted in a 45-percent reduction in employees, all union supporters. Following the January layoff, four other employees quit their jobs with Respondent so that in fact it lost 51 percent of its work force. The General Counsel and the Charging Party argue that the variance between the Bazbazes' stated intention to cut production by 30 percent and the 45–51 percent reduction in employee complement support a finding that the true reason for the layoff was to get rid of union supporters and not to solve a temporary economic problem.

[48] Though R. Exh. 2 does show that prices doubled between June 1994 and January 1995, they also show that the prices took one of their biggest jumps in the period August–November 1994. During this period of rapidly esclating raw material prices, the Company experienced 2 profitable months, September and October. It also had only a small loss in November and in December, if the accellerated depreciation figure for December is taken into account.

was possible. On the other side of the equation, the customers of the recycled plastic found the price for recycled plastic exceeding that for virgin material. At this point, many of these manufacturers changed their decision to use recycled plastic for all their containers and began using this material only for containers destined for the states where laws required the use of recycled plastic. The effect of this decision hit the marketplace in April–May 1995, when demand for recycled HDPE fell dramatically. Recylers saw orders for their product come to a standstill. Kopulsky's company was producing about a hundred thousand pounds of product a day and within a 10-day period had a million pound inventory, and no market for it. According to Kopulsky, this problem was faced by recyclers across the country. He noted that Quantum Chemical in Ohio and others were attempting to dump their inventory. Those who decided to sit on it and see if they could get rid of it slowly could do so for a period, but they were, in a sense, affected by those who chose to dump, because those who chose to dump were the companies with the deepest resources and could afford to write off the inventory. The drop in demand for recycled material was matched by a drop in demand for raw materials and the price dropped from 35 cents per pound to about 13 to 15 cents per pound. Those manufacturers without high priced inventory were able to again produce at a competitive price and take business away from those who were forced to try to sell their inventory at a profit or break even point.

The market situation which existed in April–May 1995 forced Kopulsky's company to reduce its work force from 36 production employees working on four shifts of 9 people each to three shifts of 6 people per shift, or 18 employees, a 50-percent reduction. Administrative positions were reduced from six to four in January 1995, when the Respondent decided to lay off. At this point it should be noted that Respondent did not cut any administrative or supervisory positions at the time of layoff and in fact added administrative people in the months following the layoff. Kopulsky's company was engaged in a major expansion project, as he evidently did not see a problem coming at that time. Since taking the reduction in force, the company is very selective in the business it seeks, taking only profitable business and turning down orders that would not produce a profit. It has also tried to increase automation to achieve greater production efficiency. From an industry standpoint, the recyclers are engaged in an education program to increase recycling and the use of recycled materials.

Kopulsky considers reducing production time a viable solution to the mounting financial losses, until a company can control costs and make money. Laying off employees would necessarily follow a cut back in production. On the other hand, he ties cut backs in percentage of production to an equal percentage cutback in employees, which certainly was not the case with Respondent. With respect to the process of selecting employees for layoff, he looks at work performance and the ability of employees to perform more than one function. He would also consider attendance because with a reduced work force, attendance becomes more important. When making the selection for layoff, he would look for a person who had for example, an electrical background and a background in quality control and would retain that employee over one with more longevity and less ability. He believed retaining an employee with electrical experience would be important because of the need to do routine electrical work on an immediate basis, such a changing fuses. In this regard, it should be noted that Respondent fired its most senior employee, Aviles, who had just such a background. Kopulsky also tried in his own business to cut costs wherever possible, including beginning to use permanent boxes for storage over temporary ones that to be replaced constantly. On the matter of cutting costs to save money, Kopulsky agreed that one would look to cutting administrative costs, so long as it did not negatively affect the company's long term market position. He would add to administrative costs only if it would result in an overall savings. In this regard the continuation of consultants to improve HDPE production when it has been cut back or off does not make much sense. Yet this is what Respondent has done. It also added additional administrative personnel following the layoff and did not layoff any supervisors.

When Kopulsky laid off people they eliminated shift supervisors on the shifts which were eliminated and made those eliminated shift employees. Although he did not know if it happened at his plant, he agreed that it would make sense to reduce the salary of a supervisor who was demoted to a shift employee position. At Respondent's facility, all supervisors received wage increases at the time of layoff and a number of employees, most notably, those not supporting the Union, also received a raise.

He testified that he did not reduce his work force until April because, perhaps, he was too concerned about losing customers, and not concerned enough about the bottom line. Through that time, he still had customers who were demanding material, and he was doing everything in his power to service those customers and keep from losing the customers. He gave the opinion that he should have been less service-oriented and been more bottom-line-oriented. Until April, his company had pressing demand for product, but at price spreads that were causing large losses.

During some time in the end of 1994 or the beginning of 1995, it tried to subcontract some work to Respondent, but was rebuffed, with Respondent telling him that it could not provide the material for him without losing money. Kopulsky also testified that Respondent was also having a problem at the time obtaining raw materials as one of its competitors, K W Plastics, was buying up all raw materials in the Houston area. John Bazbaz told him that Respondent was having problems sourcing the material at a price he could make money. He testified that respondent was more of an order oriented supplier, that is, planning production and buying raw materials to meet existing orders, than a company like his which was producing material in anticipation of orders. In this regard, he believed Respondent was alerted earlier to losses than his company.[49]

[49] On this point, the Bazbazes testified that in part their decision to cut production in January was based on an article they read which indicated that Proctor & Gamble was cutting back on its use of recycled HDPE in its container production. Bazbaz testified that after this announcement, the demand for his company's goods slackened. However, the availability of raw material still did not meet total demand and the price for such material remained high. Bazbaz contends that Respondent was not always able to pass through the rising cost of raw materials to its customers because it had promised a price before it purchased the raw materials. On the other hand, Proctor & Gamble was not shown to be a customer of Respondent, and the same article did not influence Kopulsky to cut back his company's production. Moreover, as noted by Kopulsky, Respondent was not a company like his that was producing in advance for the mass market that would be seriously affected by the Proctor and Gamble decision.

I have considered Respondent's evidence carefully, and relying primarily on that evidence submitted by Kopulsky, I believe that the evidence in its entirety supports a finding that though a layoff of Respondent's employees was inevitable and would have occurred at some time before June 1995, its timing and severity were dictated by anti union animus. Respondent has used a broad brush approach in both its testimony and its exhibits to support its contentions that economic necessity caused the January layoff. It has in its records the information necessary to demonstrate with specificity the orders it had in January, the material it either had or was buying to fill these orders, and the price it could charge for the finished product and the price it paid or would have to pay for the raw materials needed to fill the orders. It did not produce such information. Its own witness, Ivanov, indicated that such information is necessary to accurately say whether the Company could profitably produce orders at any given time.

Further support for the position that the layoff, or at least the timing of the layoff was discriminatory is obviously found in the mass of 8(a)(1) violations I have found to have been committed in the previous section of this decision. It is also supported by the timing of the layoff, coming almost immediately after the bulk of authorization cards were signed by its employees. It is supported by the large number of employees laid off, relative to the size of the production cut, i.e., a 30-percent production cut and a 45-percent reduction in employees. This reduction in employees grew to 51 percent when Respondent did not replaced workers who quit or were fired after the January layoff. It is also supported by the evidence relating to overtime paid after the layoff, which appears to me to be determined effort to keep from recalling any laid-off employees.[50]

The General Counsel and the Charging Party assert that excessive overtime has been used to sustain Respondent's production levels and to avoid recalling any of the laid off employees. The Charging Party points out on brief that from February 21, through May 30, Respondent permitted 1,415.5 hours of overtime to five of its supervisors and 3,963.25 hours of overtime to nonsupervisorial employees, for a cumulative employee and supervisor overtime total of 5,378.75 hours. This is enough overtime to have rehired 8.4 employees on a full-time basis. There is evidence in the record of overtime worked by supervisors and employees both before and after the layoff. I have compared the overtime hours for supervisors and those employees who were not laid off for comparable periods before and after the layoff, and total overtime hours for the same period for all employees. This comparison reflects that supervisors are working almost twice as many overtime hours in the postlayoff period as was the case in the pre-layoff period. Nonsupervisory employees are working about 56 hours overtime in the postlayoff period as opposed to an average of about 45.5 hours overtime in the pre-layoff period.

Following the layoff, Respondent also took some economic steps which are inconsistent with its alleged financial difficulties. First, it granted all of its supervisors 50- to 75-cent-per-hour pay raises. Bazbaz testified that the supervisors were given a raise because they were going to have more responsibility or take on extra jobs after the layoff. This may have been true, but it is still inconsistent with Respondent's plea of poverty. So is the fact that it continued to pay Hallatt's company a substantial sum of money for consulting work and began paying Guerrero $1615 biweekly. Bazbaz testified that some cost savings measures were considered, but reducing management salaries or workers wage rates were not considered. Bazbaz, for example, did not consider cutting his annual salary of $120,000. Bazbaz cited the automating of a bagging process as a cost savings measure taken by Respondent, but he did not know whether this was done before or after the layoff. Reducing overtime was not feasible as Bazbaz contends overtime is caused by factors beyond management's control. The reason for this was described by Bazbaz thusly, "you don't know at what time you are going to receive the materials because they are so scarce and so difficult to get that you have people sometimes waiting for the materials. And when the materials come in, they have to continue working until they get the materials out." He amplified that Respondent did not acquire raw materials "because the customer could not pay a price that would enable us to process the material and be profitable." Again, no specific examples or evidence of such a situation was offered.

Respondent's actions with respect to Luis Aviles also strike me as being discriminatorily motivated as opposed to having been dictated by economics. As noted earlier, Aviles was the Respondent's in house electrician and was its most senior employee. Until the union campaign his work had evidently been adequate and he performed tasks both for Respondent and its sister company, Polytex Fibers. Indeed he was given pay raises in October and November 1994. However, by the time Guerrero and John Bazbaz testified in this proceeding, he had become an inadequate worker, called slow and not possessed of the necessary skills for his job. Guerrero after the fact testified that the raises given Aviles were unwarranted. After the criticism of Aviles' work was leveled by Guerrero, he shifted his focus somewhat and testified that the main reason Aviles was laid off was because the Company did not need in house electrical maintenance anymore as the problems it had were minimal. Guerrero testified that he recommended after the layoff that Aviles' position be eliminated. He testified that some installation work was performed postlayoff by electrical contractors, and though Aviles could perform the work, he could not do it in the same time as the outside contractor. He testified that Aviles did not have the experience or speed at this type work. There is no proof that the work performed by the outside contractors could not have been done, at least in substantial part by Aviles and at a substantially reduced cost as he made $8.50 an hour and the contractors charged from $8 to $19.50 per hour.

I agree with the General Counsel and the Charging Party that Aviles' position was eliminated primarily to keep from having to recall Aviles. Bazbaz seemed particularly hurt by his oldest employee's support for the Union. Support for this position can be found in a post layoff conversation Aviles had with Bazbaz. Aviles and union organizer Medrano had had a run in with Bazbaz in March when they tried to handbill the plant.[51] Later

[50] Respondent offered testimony to the effect that overtime is worked postlayoff because materials many times do arrive at the scheduled time. This situation causes the production schedule to be delayed and that generates a delay in the delivery of materials to the customer. That creates an urgency and the need to process them immediately, thus sometimes causing overtime to be used to be able to process the material more rapidly. No concrete example of such an occurrence was given in the record and certainly such situations would not explain the very large amounts of overtime worked post-layoff.

[51] In March 1995, union organizer Medrano and Aviles attempted to handbill the Respondent's facility. According to Medrano and Aviles, Bazbaz saw them and motioned to a security guard who was not paying

that same day, Aviles saw Bazbaz at a chiropractic clinic to which he had taken his wife for treatment for an injury suffered in a car accident. Aviles also had his children with him. By coincidence, Bazbaz came in to be treated and seeing Aviles, sat near him. According to Aviles, Bazbaz told Aviles that he was surprised by Aviles' attitude, that he was a supervisor and a supervisor could not be involved with the Union. Bazbaz added that the person with whom he had been distributing flyers earlier that day was very aggressive. He asked if this person belonged to Aviles' church. Aviles said no and Bazbaz told him that he had read a lot of literature regarding unions, and that unions are worse every time. Bazbaz said that the ILGWU in some previous years had approximately 300,000 members and now they have 150,000. Bazbaz continued saying that in unions members have to pay dues and that unions live off those dues.

Bazbaz then said that he was paying Aviles well when he was working for him, and asked if he were making it on unemployment. Aviles answered that he was not. Bazbaz said if he called Aviles back to work, he was not going to give Aviles the same position of trust that he had had. Bazbaz then said that he knew that all the people inside the Company who were involved with the Union. Then he told Aviles that whenever he wanted to go and talk to him, he could go to his office, that the doors were open for him. Aviles told him he was ready to go back to work then. Bazbaz said he was scared of the situation because at this time he cannot buy materials easily. The work is very slow and he did not believe it is going to be resolved or it is going to be better.

Bazbaz testified about the meeting with Lucio Aviles at the chiropractic clinic. Bazbaz confirmed this meeting occurred the same day that the confrontation with Aviles and Medrano had taken place. Bazbaz testified that he walked into the clinic, saw Aviles and sat at the end of the room. Aviles come to him and sat down next to him. Aviles asked if Bazbaz would give him a job, and Bazbaz responded that Aviles had been in a supervisory position and that he would not be able to get that position back. On the other hand, he told Aviles that if a position for Aviles became available, he would hire him back. At some point after this conversation, Bazbaz eliminated the electrician's position at the plant and subcontracts that work and indicated no interest in reviving the electrician's position.

Aviles' problems with Respondent began with it gaining knowledge of his union activity. Almost immediately prior to Respondent gaining such knowledge, it gave Aviles raises and offered to make him a supervisor. I do not credit any of the testimony about Aviles' performance being unsatisfactory as it flies in the face of demonstrable conflicting evidence. I do credit such testimony for the proposition that Respondent was trying to create a valid reason for discharging Aviles and thereafter doing away with his position. I find that Aviles, individually, was discharged for his union activities and his position eliminated for the same discriminatory reason.

I further believe and find that the process used to select employees to be laid off was discriminatory and aimed at ridding Respondent of known union supporters. Javier Guerrero selected the number and identities of the employees to be laid off following the instructions of John Bazbaz. John and Issac Bazbaz and Guerrero all testified about the manner in which the number of employees to be laid off was selected. John Bazbaz testified that it was decided to have a 30-percent reduction in the operating time on the machines and the people that work on the machines. He later testified that it was decided to slow the production by about 30 percent. Issac Bazbaz testified that was decided to cut operating time on the machines by about 30 percent because production was dropping substantially from a high in November. Guerrero first testified that Bazbaz told him to carry out a reduction which would involve 30 percent of the people. In later testimony, this changed to 30 percent of production capacity. As noted earlier, the General Counsel and the Charging Party assert these different versions of what was intended with respect to the layoff is significant because over 45 percent of the production employees were laid off, not 30 percent. Twenty nine production employees out of a total of 64 production employees were laid off in January. Additionally, four more production employees left Respondent's employ after the layoff and before the June hearing in this case without any employee being recalled to replace them, thus raising the percentage of work force reduction to 51 percent. I agree with their position in this regard and also with their contention that excessive overtime has been used to sustain the large cut in workers and to keep from recalling laid-off employees.

John Bazbaz directed Guerrero to choose the workers for layoff, taking into consideration tardiness, absenteeism, skills, and warnings. After testifying about these factors several times, he added that another factor was the employees' ability to work flexible schedules. Guerrero did as he was told and developed a list of employees to be laid off. Bazbaz testified that Guerrero did not discuss the list with him, instead simply telling him that there were about 28 workers that they needed to lay off to get production to the desired level. Bazbaz asked Guerrero if he had taken into consideration when making the list the criteria given him, namely, warnings, tardiness, skills, absenteeism, and flexibility. Guerrero assured him he had and then took the list to the personnel department to prepare layoff letters.

Maritza Patel, Respondent's human resources manager, was asked by Guerrero to check the files to determine employees attendance, absenteeism, and warnings. She set up a computer program which contained employees' names, number, expiration date for their work permit, department number, warnings, shift, times tardy, and times absent. The tardiness and absenteeism columns cover the months of October, November, December, and January. The warnings column covers the employees' entire employment history. This program was created a day or two before the layoffs occurred and the printout from it was given to Guerrero. Patel denies knowledge of any union activity at the time the list of employees to be laid off was prepared.

Guerrero testified that he was to make sure that certain machines remained operational and to select employees to be laid off based on warnings, attendance, and tardiness. Guerrero took the list supplied by Patel and marked the names of employees

attention. Bazbaz personally approached the two men and told them not to handbill in the parking lot and told the guard to call the police. Medrano told him to call the police that they were not handbilling on Bazbaz' property. According to Bazbaz, he observed union supporters handbilling employees, and talking with his security guard. Bazbaz testified that he approached the three men and told the guard to "let these people do whatever they wanted to do as long as they were not in the parking lot and not disturbing the traffic and it was okay for them. Bazbaz then testified that Medrano said the if he did not like it to call the police. Bazbaz did not call the police. This confrontation is not alleged in the complaint to be a violation of the Act and I will not make such a finding. There is little if any evidence in the record about Respondent's rules regarding solicitation and distribution and no actual proof about whether Medrano and Aviles were on company or public property at the time of the handbilling.

to be laid off, primarily the ones with warnings. This manner of weighting the factors had the obvious effect of putting more senior employees at risk as they would have had a longer period of time to receive a warning than a new employee. The newest employees at the Company were also the only ones who did not sign authorization cards. In any event, Guerrero testified that he maintained enough persons by department and shift to keep operations going. Guerrero testified, for example, that in the extruder area, there were four working groups of five employees each. He reduced that number to three. In the grinding department there were three work groups, which he reduced to two. In each work group of five employees, that number was reduced to three. In the washing operation there were four work groups, which were reduced to two. One work group was reduced in the densifier department. Positions such as packing were reduced as there was not going to be as much product to pack. The materials receiver position was eliminated as there was not enough materials being received to justify the position.

Guerrero testified that he tried to keep the employees who had the best record, and those who could handle more than one machine. This I do not believe nor do I believe his testimony to the effect that he considered employee flexibility in determining who was to be laid off. The list of laid-off employees appears to me to have been prepared with an eye to defending it, as it more than anything shows that persons were laid off mechanically without thought being given to individual's abilities and experience. As noted above, the list was weighted in favor of the newest employees, those with the least experience and demonstrated ability, but who were also not in support of the Union.

At the time of the layoff, Guerrero created a new classification group for employees, a "cross-trained utility group. He testified that this is a group of employees who know how to operate more than one machine and can work any shift. He used this group to give support in the positions that he needed to cover. Strangely, this group, which one would have assumed would have the most skilled employees is made up in large part with the newest and least experienced employees, including those employees who did not sign authorization cards. Group member Jeronimo Perez was hired by the company on November 15, 1994. Group member Antonio Pivarel was hired on January 16, 1995. Group member Rene Iraheta was hired on December 27, 1994. Group member Jose del Cid was hired on December 5 of 1994. Group member Otto Barreno was hired on January 11, 1995. Group member Orilio Barreno was hired on January 11, 1995. These were the last persons hired by the Company before the layoff. It is also interesting to note that Oscar Barreno had accumulated four tardies by the date of layoff and his cousin Orilio had accumulated five tardies by the time of the layoff. Guerrero said they were retained because they did not have absences or warnings and were flexible in work schedules. Guerrero was asked if it made any difference to him in the selection process that these men had accumulated four or five tardies within the 2 weeks they had worked for Respondent. He indicated that he was aware of their tardiness, but excused it because of weather or car trouble. Excuses for absences and tardies were apparently not considered with respect to the employees laid off though the evidence establishes that absences and tardies were routinely excused by Respondent.

All supervisors were retained regardless of their record with respect to absenteeism or warnings. It was pointed out that Sergio Palacios had 32 tardies and Guerrero excused this saying that Palacios had a very flexible schedule. It was pointed out that Cesar Portillo had 13 tardies and Guerrero had the same answer. The same was true for Fernando Molina who had 11 tardies. Erick Hernandez was retained with 11 tardies and Javier Garcia was retained with 17 tardies. Employee Homero Alfaro was retained with 18 tardies and Guerrero explained that he was a mechanic with extensive experience. It was pointed out that laid-off employee Miguel Molina was also an experienced mechanic and only had five tardies.

Guerrero testified that at the time of layoff they had eliminated all the persons that it could afford to eliminate and still keep the Company running. Yet, subsequent to the layoff, four employees have quit and have not been replaced. Guerrero said this was accomplished by modifications to equipment that have made the operation more efficient and made it unnecessary to replace these four employees. I cannot find any hard evidence of what these modifications might have been. Work on the conveyor system modifications ended in May 1995 without the modifications being completed.

During the hearing, the Charging Party presented the testimony of statistical expert Mary Burns, who testified as to the statistical probability that the employees selected for termination could have been selected for non discriminatory reasons. During her testimony, M. Burns showed that there was only a 4.26 chance that 20 union card signers could be terminated in a reduction in force out of 64 employees, where 59 of 64 employees were card signers. Burns also demonstrated that the probability of selecting 29 persons for layoff, 9 of whom were members of the 10 person organizing committee, from a group of 64 employees, was .00245, significant less than one percent. She demonstrated that the probability that 16 of the 19 attendees at a January 18, 1995 card signing/union organizing meeting would be among the 29 people selected for termination was only .00546 or 1 in 18, 310. Burns offered that such odds were statistically significant deviations.[52]

In conclusion, I find that Respondent has failed to adequately rebut the General Counsel's strong showing of discrimination in the layoff of January 27 for all the reasons set forth above. Although I also believe that a layoff of some level would have occurred at some point well after January 1995, but before June 1995, I believe that this matter can best be determined at the compliance stage of this proceeding. Therefore I find that as alleged in the complaint, the January 27 layoff and the process used to select employees for layoff are in violation of Section 8(a)(3) and (1) of the Act.

E. Was Respondent's Postlayoff Call-in Requirement Unlawful?

Respondent gave each laid-off employee a letter dated January 27 that required that each of the employees laid off to call in daily, Monday through Friday, and their failure to do so could result in their being terminated. Maritza Patel prepared the letter from a form letter obtained from a company that advises Respondent on unemployment matters. She added to the letter the times the employees were to call in and the name of

[52] Statistical evidence is admissible to show the probability that a mass termination could have occured for a nondiscriminatory reason. Statistical evidence may support an inference of unlawful motivation. *NLRB v. Cameo, Inc.*, 340 F.2d 803 (5th Cir. 1965). Certain statistical evidence submitted in rebuttal by Respondent is not considered relevant by me as it is not based on accurate base figures.

the person to call. in preparation for the layoff. The letter reads as follows:

> You are part of a temporary reduction in force. As this reduction is "temporary" you are subject to be recalled on a daily basis. Part of your responsibilities to maintain your eligibility to work with our company is to call every workday morning, Monday to Friday, between 10:30 a.m. to 11:00 a.m. to determine if you are one of the employees to be recalled that day. Call Rosa Benitez at [number omitted]. Failure to do so for 2 consecutive days will cause us to consider you unavailable for work or having resigned your position with our company. If you have found another job, or for another reason you will not be available to work, call also. Failure to do so may have a direct effect upon your benefits of future employment.

John Bazbaz testified that the letter was given to employees because the Company did not have current phone numbers and addresses for the employees and that the layoff was intended to be temporary in nature. I do not believe that Respondent did not have this information, and even if it did not, it would have been far less cumbersome for the employees and far less costly for Respondent to take this information at the time of layoff rather than opting for the call-in requirement. I believe the more rational reason for the requirement, given the discriminatory motive for the layoff, was to find a way to permanently discharge employees and have a reason for not recalling them when production increased.[53] As I find that the requirement was made in furtherance of the discriminatory and unlawful layoff, I find that it too was intended to unlawfully discourage the employees from engaging in protected conduct and was thus made in violation of Section 8(a)(1) of the Act. The call in requirement was changed in March at the request of the Board. The change required the employee only to write in or call in saying they were interested in recall and giving their address and phone numbers.

F. Did Respondent Retaliate Against Witnesses Following the June Hearing?

The complaint alleges that beginning during the hearing in this proceeding which was conducted in June 1995 and continuing thereafter, Respondent has engaged in a pattern of retaliation against the witnesses who testified against it. The alleged retaliation took the form of illegal interrogations, threats, warnings, a discharge and a July 7 layoff of 10 more employees.

1. Did Respondent question employees as to their testimony after their appearance at the hearing?

Camilio Ramirez was recalled as a witness after his first visit to the stand on June 6. He testified that on June 7, he reported for work, and was met by Supervisors Fernando Molina and Sergio Palacios. There was also a group of employees nearby waiting to leave work. Palacios asked him what had been said at this hearing. The witness pointed out that he could not talk about that as he had been sequestered. Molina said, "Your mommy told you not to say anything?" The witness did not answer. Instead, he asked the other employees if they had received a subpoena to testify. Palacios said that those things (subpoenas) were "cock-sucking." The witness said that is not correct. Palacios addressed the employees and said, "That if they didn't want to go to testify in Court, not to go; only to return the subpoena by mail." The witness responded to this bit of misinformation by saying, "No, Sergio, because if they do not appear in Court, the police are going to go after them to take them to testify." Palacios answered, "Those are just stupid things, unimportant things." Palacios also asked him who was involved with the Union at this time, the real leaders of the union. The witness told him Luis Castro and Lucio Aviles. Ramirez also contends that thereafter, his work schedule was reduced for a while.

Both Palacios and Molina answered "No" when asked whether they had a conversation with Camilio Ramirez on about June 6, 1995, about Ramirez' testimony in this proceeding. I have heretofore found that both supervisors gave less than credible testimony when they denied knowledge of the union campaign prior to the layoff and thus their blanket denial of a number of unlawful conversations and threats made against union supporters pre-layoff. I find nothing which would require a different finding with regard to the credibility gap that exists in this incident. I credit Ramirez' testimony set about above and find that Respondent thus engaged in conduct in violation of Section 8(a)(4) and (1) of the Act.

2. Were Camilio Ramirez, William Rosales, and Marco Posadas warned or otherwise disciplined because they gave testimony in this case?

Camilio Ramirez, who appeared as a witness in this proceeding and gave testimony against Respondent returned to work after his testimony. A day or so after his testimony, he was he was working on a machine that compressed boxes and banded them with straps. One of the boxes came out of the machine with some straps broken. The forklift driver, William Rosales, who had also testified against Respondent, arrived to pick up the boxes and Ramirez warned him to be careful because of the broken straps. Javier Guerrero approached the two employees at this time and in an angry tone, told Ramirez that if he ever saw him talking again, he would receive a warning. According to Ramirez, Guerrero had never spoken to him like that before. There is no rule against employees talking at Respondent's facility and no explanation was offered for this outburst against Ramirez.

William Rosales testified that subsequent to this incident, he was given a written warning for talking with another witness, Marco Posadas, about a work-related matter. He was operating a forklift and noticed some wires on the floor. He called to fellow employee Marco Posadas to pick up the wires so they did not become entangled in the wheels of the forklift. Rosales had been told to be careful of just such occurrence by Javier Guerrero earlier. Posadas responded and while he was picking up the wires, Guerrero approached and angrily grabbed Rosales by his arm, telling Rosales he was going to be given a warning. Guerrero said that he had seen Rosales talking with Posadas six times. Rosales did not say anything to Guerrero, though he testified that this accusation was false. Respondent has no written work rules and Rosales testified that he had not been told of

[53] Luis Castro testified that he went back to the plant on January 31, to pick up his paycheck. He was standing in a line of other employees waiting for their checks, when Bazbaz came up and told the group of employees that if they wanted to work that they should continue to call. According to Castro, Bazbaz then turned around and laughed, as if he were making fun of the employees. With respect to this incident Bazbaz testified that he did not laugh at the employees and simply told them to call in as he expected to get material at any time. I credit Castro's version of the event as no action taken by Respondent after the layoff evidences any intent to recall anyone. To the contrary, look again at the overtime granted those employees not laid off and the failure to recall laid-off employees when employees quit postlayoff.

any prohibition against talking with fellow employees. Rosales testified that after Guerrero threatened him, he saw Guerrero go to Posadas and Rosales left the area. Later, about 5 to 10 minutes before quitting time, Posadas came to him and told him that he, Posados, had been fired. Rosales received a written warning for this incident.

Posados corroborated Rosales' testimony that he was asked by Rosales to pick up wire from the plant floor so Rosales could perform his work. He testified that Guerrero came up and asked why the employees were talking. Posadas testified that he wanted to explain, but Guerrero would not let him. Guerrero then said he was giving them a warning for talking. Five minutes later, Supervisor Zepeda summoned Posadas and another employee Guadalupe Leal to the office. Guerrero gave him a written warning which Posadas would not sign because he did not believe it to be true. Guerrero then asked Leal to sign as a witness and Leal declined saying he had not seen what occurred. Guerrero then told Posadas to go home. Posadas asked for a letter to obtain unemployment compensation and Guerrero said he could not give it to him. It was 3 p.m., the normal end of the shift, and Posadas punched out and left. Posadas contends he was fired because Guerrero said, "Leave. You don't work here any more."

With respect to the alleged termination of Posadas, Guerrero testified that Posadas was given a warning on June 14, but was not fired. In this regard, he testified he gave Posadas a warning, noting to him that counting the instant one, Posadas had accrued three warnings Guerrero told Posados that John Bazbaz was going to review the warnings. According to Guerrero, Posados then said he was quitting and leaving. Guerrero testified that he said Posados could leave as his shift was ending and that if there was something else to come from the incident, he would tell him the following day.

According to Posadas, when he arrived home about 5 p.m., John Bazbaz called and said, "This is John Bazbaz, and I found out what happened. I want you to return to work tomorrow, like always." Posadas returned to work the next day and worked continuously until he was laid off on July 7. With respect to the alleged firing of Marco Posadas on June 14, Issac Bazbaz testified that he was present when John Bazbaz spoke with Posadas by telephone on that day. He testified that Posadas believed he had been terminated and John Bazbaz told him that he had not been dismissed, that he would talk further with him and to continue to work. John Bazbaz testified that he learned that Posadas had been warned and phoned him and told him that he understood that he had been given a warning. He told Posadas that he was to report to work the next day, and that after the trial, he would investigate the circumstances. According to Bazbaz, Posadas said, "Yes, sure, no problem."

I credit Posadas' testimony about this incident and find that he was discharged by Guerrero. John Bazbaz did not call William Rosales who received a written warning to see if he was coming to work the next day. Unless Posadas had been terminated there was no reason for Bazbaz to call him. I further find that the basis for Rosales' warning and Posadas' discharge was their testimony in this proceeding. There was no basis in either work rules or past practice shown by Respondent for taking the disciplinary action against the two employees and given its animus toward the Union, I find that the discipline was meted out in retaliation for their testimony.

3. Did Respondent deny employees Camilio Ramirez, Jose Melendez, Jesus Martines, and William Rosales their normal work hours and/or overtime hours in retaliation for their testimony?

Jesus Martines was recalled as a witness, having previously testified on June 9. After he finished testifying, he went to work. On arriving at the plant, his supervisor, German Robles, told him there was no work for him to do because the machine he operated was being repaired. The same situation had existed the day before he testified, but on that day, he was assigned to different work. When he was sent home, he gave Robles his phone number and was told that Respondent would call him when they needed him. He later was informed not to report to work until Monday, June 12, although he had been scheduled to work Saturday, June 10. According to Martines, Cesar Portillo has been demoted from supervisor to washing machine operator. Portillo was allowed to continue working cleaning the washing machines on the days Martines was not.

Jose Melendez testified here on June 7. At that time he was working as an extruder operator on the 3 to 11 p.m. shift. On his return to work following his testimony, a supervisor, Herman Robles, warned Melendez and about seven or eight other employees beginning work not to talk with anyone. Melendez, on this day or the next, also saw his working time reduced. He had just punched in on his shift when Javier Guerrero told him to go home, that he was not being granted any more overtime and that a new work schedule was being prepared. The shift that Melendez was starting would be overtime, but was previously scheduled and had been the same for more than a month. Guerrero also told him that if it became necessary to call him to work, Supervisor Molina had his phone number. He was also supposed to work the following day, but Guerrero told him not to report for work, they would call him if they needed him. On Saturday, he called to see if he would be needed and reached Augustine Garcia. Garcia told him he did not know if he was needed and to wait 10 minutes while he checked with Supervisor Molina. Molina came on the line and told him to wait another 20 minutes while he talked with Guerrero. Melendez hung up and called back about 20 minutes later, but no one answered. He tried again, but still could not get an answer and thus did not report to work. Melendez reported to work the following Monday and spoke with Supervisor Augustine Garcia, who said he had attempted to reach Melendez on Saturday as he had work for him. Melendez said he was lying as he did not receive any calls Saturday. Melendez has a company beeper.

Melendez has not worked any overtime since he appeared as a witness in this case, though another operator performing the same function on the same shift continued to receive overtime. Additionally, the witnesses helper on the extruder was taken away from him on June 25. Melendez asked his supervisor German Robles why this was happening and Robles said he needed him somewhere else.

Prior to his testimony on June 7, William Rosales had been working nine to twelve hours a day. Since then, he works no overtime. He also had been allowed to work on his normal day off and that has been canceled. His work week has dropped from 55 to 60 hours a week to 48 hours a week. Rosales also testified that though his overtime was cut, other employees were allowed overtime. Rosales specifically mentioned another forklift operator as being an employee who continued to work overtime. Before Rosales first testified, he was told by a supervisor that he was working overtime because the Respondent did not have enough personnel. Rosales further testified that after

his testimony, supervisors who had normally spoken to him would no longer do so. He noted in connection with the incident noted above wherein Guerrero warned Ramirez against speaking with other employees, that he had seen Guerrero speaking with Supervisor Molina shortly after the incident. Ramirez then testified that Molina came to him and said that he would not be needed to work on Saturdays. Saturday was one of his 5 regular workdays.

Respondent offered no evidence in denial of these employees testimony and I credit their testimony, finding that their overtime hours and scheduled workdays were cut by Respondent immediately after their testimony here. As no business reason was offered by Respondent for these actions, I infer that they were in retaliation for the employees' testimony and in violation of Section 8(a)(1), (3), and (4) of the Act.

4. Did Respondent tell an employee that he had been instructed to make things hard on him to induce him to quit his employment?

David Contreras testified on June 8 and was recalled as a witness. After his initial testimony, he returned to work and had a conversation with his supervisor Israel Zepeda regarding how many bags he was to produce on his machine. Zepeda told him that he had to improve on the record of the previous shift which had produced 18 bags. He told Zepeda to give him a helper and Zepeda said he would furnish one at 3 a.m., about 4 hours into the shift. There had been a helper on the earlier shift. He never got a helper on this shift and produced about 15 bags by himself. He went to Zepeda at 3 a.m. and asked for his helper. Zepeda said he could not furnish one because he had orders from Javier Guerrero and from John Bazbaz to provoke him to quit for giving testimony against the Company. By the time of October hearing Zepeda had quit working for Respondent. Guerrero denied ever telling a supervisor to make things hard for an employee so that he would quit. Whether Guerrero actually told Zepeda to tell Contreras these things, I am not sure. However, I do believe Contreras' testimony in this regard and find that Respondent has violated Section 8(a)(4) and (1) by Zepeda's actions.

5. Did John Bazbaz threaten to kill Camilio Ramirez?

As noted above, Camilio Ramirez testified in early June and was thereafter subjected to certain harassment and loss of overtime. He also testified in the continued hearing that subsequent to his earlier testimony John Bazbaz threatened to kill him, apparently in retaliation for his earlier testimony. In the main that testimony involved a conversation he had with Bazbaz in around April 1995. At that time, Ramirez had suffered an injury to his hand and was having difficulty performing his work. According to Ramirez, John Bazbaz came to him at work after the injury and asked him if he were tired. He explained to Bazbaz about the injury. Bazbaz told him to go to his office. At the office, Ramirez asked Bazbaz to help him because of the injury to his hand. Bazbaz told him not to worry about anything. The two men then talked about the Union. Bazbaz told him that the unions were no good, noting a company in Dallas that was unionized and all the workers were fired. According to Ramirez, Bazbaz told him that at one point there were a thousand employee members, but now there were only about a hundred. Bazbaz continued telling him that he had laid off the other employees because of lack of work, not because of the Union.

Ramirez commented that Aviles had told him that his fellow workers had earlier attempted to form a union to see if he would better their wages and receive benefits and were told by Bazbaz that they had no rights and the doors were open for anyone who wanted to leave. Bazbaz denied saying this and told him that Aviles was a guy that was not grateful because he was the electrical supervisor who should not have been involved with the Union. He added that he had given Aviles everything he needed. According to Ramirez, Bazbaz again told him that unions were no good and that there was no need for middle men. He added that if Ramirez had any problem, just come to him. Bazbaz then told him again not to worry about his hand, but that he wanted one small favor, to have the witness testify for the Company in court. Out of fear of being fired, the witness agreed. Bazbaz also asked him to keep this conversation a secret.

Bazbaz had a different version of this conversation. Bazbaz testified that Ramirez asked to speak with him privately. According to Bazbaz, Ramirez told him that he was a member of the Union and Bazbaz said he knew that. Ramirez then told Bazbaz of a medical problem he had with one of his hands. As Ramirez had a job requiring physical effort, Bazbaz was concerned that the injury was job related. So Bazbaz said he was sorry about the injury and not to worry. According to Bazbaz, Ramirez then told him that he had gone to the Union and told them of the injury and had been advised to return to the plant and fake a fall to explain the injury. Bazbaz asked if he would be willing to testify to this conversation with the Union and Ramirez said he would. Bazbaz subsequently paid for medical treatment for Ramirez' injury.

This conversation was not alleged in the complaint as being unlawful. On brief, the Charging Party and the General Counsel assert that it should be found unlawful, and I agree to a degree. Crediting the testimony of Ramirez as set out above, I find that the conversation is coercive and demeaning of the Union, thus violative of Section 8(a)(1) of the Act. I do not find Ramirez' testimony about testifying on behalf of the Respondent in "court" sufficiently specific to justify a finding that Respondent was attempting to somehow bribe Ramirez into impeding Board processes or to offer untruthful testimony. It could well be that Bazbaz' assertions in this regard are true. They are not contradictory of what Ramirez stated.

Camilio Ramirez was recalled as a witness at the October hearing and, according to Ramirez, about a week after his second appearance here, he was working at about 9 or 10 in the morning when he was approached by John Bazbaz, who was alone. According to Ramirez, Bazbaz said, "Do you know, Mister,[54] I have not had a chance, but now that I have it, I am going to tell you. You are going to die, you son of a bitch. I am going to kill you." According to Ramirez, he responded by asking Bazbaz, "Are you threatening me, sir?" Bazbaz allegedly then said, "No; I am advising you, I am threatening you; I am telling you that you are going to die," again calling him a "son of a bitch." Bazbaz added, "You know what; I already forgave you once. Only God is missing; But not even God; Because for—so that God may forgive you, I—you have to be a good person." He also told me, You know what; Be very straight in the job because the most minor fault, that—I am going to fire you." Ramirez testified that at this point, he was

[54] According to Rameriz, Bazbaz used the term "Maestro," which in Mexico is a term used to refer to persons who perform the most menial tasks in society, and is a very derogatory term.

frightened and left work. He amended this to say that he left about 2 hours after his encounter with Bazbaz.

According to Ramirez, he spoke with Bazbaz again before leaving. Ramirez went to Bazbaz' office and asked to speak with Bazbaz. When Bazbaz appeared, Ramirez asked to speak with him privately. Bazbaz laughed and indicated that Ramirez should come into his office. He did so and found that present were Carlos Hallatt, Luiz Mendoza, and Javier Guerrero. Ramirez told Bazbaz that whenever Bazbaz wanted to do what he had said that morning, he was at his disposal. Bazbaz laughingly said, " I don't know what you are talking about. Ramirez responded, "No, sir," I said, "You do know what. You know what you told me this morning, that you were going to kill me." That, "You are going to die." Bazbaz laughingly said, "I don't know anything about that." Ramirez added that mocking him and laughing at him were the other three management members present. Ramirez testified that when he saw this, he told Bazbaz that he had only come to tell him that and he was leaving. Bazbaz said for him not to leave, that would be insubordination. Ramirez stood up and Bazbaz continued, complaining about the quality of Ramirez' work. Bazbaz told Ramirez to keep the place clean and do his work well. Bazbaz also complained that Ramirez would not fill out necessary paperwork when he went to see a doctor. Bazbaz then referred Ramirez to Guerrero with regard to this paperwork. Ramirez told Guerrero that no one had ever told him about any such paperwork. Bazbaz interjected "If you didn't know it, now you know it. Ramirez ended the meeting by saying, "From now on, whenever I would go out, I would look for the paper and sign it, and, regarding the cleanliness of the place, all the time that I had a chance to clean, I would clean." Ramirez left, telling Bazbaz he had to leave because of an emergency involving Ramirez' wife. Supervisor Israel Zepeda had earlier told Ramirez that he had received a call from Ramirez' wife about the emergency.

Ramirez returned to work the next day after the alleged threat and continued to work until he was laid off some days later. Ramirez testified that he reported the incident to Lucio Aviles. He also testified that he wanted to report it to the police, but did not, for unexplained reasons. He also said he reported the incident to Supervisor Augustine Garcia and told union organizers Ricardo Medrano and Andy Garza about the threat. He gave a written statement to the union organizers about the incident in August 1995, which was supplied to the Board in that month. Medrano testified that he learned of the alleged threat from Lucio Aviles. Aviles told Medrano that a death threat was made against Ramirez and that he was very scared and didn't know what to do. Medrano told Aviles to contact Ramirez and have him get in touch. Ramirez called him a couple of hours later Medrano could not remember what month in which these conversations occurred. According to Medrano, Ramirez told him that John Bazbaz had threatened him and threatened his life, and he was very scared; he didn't know what to do. Medrano testified Ramirez said he wanted to leave the Company and just forget about the whole thing. Medrano then told Ramirez he needed to speak with the Union's attorneys and with the Board. Medrano relayed Ramirez' allegations to Andy Garza, Betty Boyer, and Attorney Janovsky.

Bazbaz testified he learned of the allegation that he had threatened Ramirez from his attorney at some point in early August. He also testified about the events of the day that Ramirez said the threat occurred, which was 2 or 3 weeks after Ramirez had testified in the first hearing. He testified that he and Javier Guerrero took a tour of the plant about 10 a.m. on that day for about 15 minutes. They encountered Ramirez baling paper scrap and cardboard boxes. Bazbaz testified that he approached Ramirez and said good morning and told him to make sure that he did not scrap boxes that could be used again and Ramirez said it was no problem. He also told him to keep polypropylene scrap separate from the other scrap because of a difference in the price for the two types. According to Bazbaz, this was the end of the conversation and he and Guerrero continued through the plant and then returned to the office.

Guerrero testified about meeting with Ramirez in the morning. According to him, they encountered Ramirez on a tour of the plant and said hello. Bazbaz then told Ramirez to be careful with the boxes he was scrapping, and to ask his supervisor if he had any question. Bazbaz also told him to keep the work area clean in order to make it safe, noting that there could be an accident if someone walked where the scrap boxes were. Guerrero testified that Ramirez said okay, and Bazbaz and Guerrero left the area.

About 2 hours later, Luis Mendoza advised Bazbaz that Ramirez wanted to speak with him privately. According to Bazbaz, he was unwilling to do that because there was confusion about their previous conversation in April wherein Bazbaz was accused by Ramirez of trying to bribe him into testifying against the Union. Bazbaz told Ramirez to enter his office and he asked in three management witnesses, Mendoza, Hallatt and Guerrero. As they entered, Bazbaz asked Ramirez what he could do for him. Bazbaz testified that Ramirez said, "I am here for you to do what you were going to do to me. And I asked him, What are you talking about? He says, Well, you know what. Bazbaz said, No, I don't. Please explain." Suddenly Ramirez changed the subject, and said, "Well, you know, I got to go because I have an emergency and my wife called, and I need to go." Guerrero asked Ramirez to fill out a form excusing his leaving early and Ramirez nodded yes. Bazbaz told him in parting, "Look, Camilio, if you do your work—if you come early to work, if you come on time to work, if you do your job as you should and you keep your area clean, you shouldn't have any problems in the plant." According to Bazbaz, Ramirez said yes. Ramirez returned to work the next day. Bazbaz testified that during the meeting the other three management members did not mock or laugh at Ramirez, but remained quiet and listened. Guerrero, Hallatt, and Mendoza gave essentially similar descriptions of this meeting. According to Guerrero, Bazbaz asked him what Ramirez had been talking about after Ramirez left.

I believe that Ramirez truthfully felt that Bazbaz had somehow threatened him in the morning. His opening comments at the afternoon meeting with the management officials, which all participants described similarly, support this finding. Given his treatment at the plant after his testimony in June, he can be excused for feelings of paranoia. On the other hand, I do not find that Bazbaz threatened to kill Ramirez or believed that he had threatened him physically in any fashion. Ramirez could easily had interpreted Bazbaz' criticism of the way in which he was performing his work that morning to be a threat of some sort. Having observed John Bazbaz for almost a month of hearing, I do not believe he would either speak to an employee in a demeaning manner or threaten to cause them physical harm. Bazbaz is a very intelligent, soft spoken man who appeared to have a great deal of patience. Nothing in his demeanor would suggest he would lose his temper and threaten an employee as

Ramirez alleges. Moreover, there is no explanation as to why this incident was not reported to the Board until over a month after its alleged occurrence. I do not credit Ramirez with regard to the alleged death threat and do credit Bazbaz' denial that such a threat was made.

6. Did the Respondent unlawfully lay off employees on July 7, 1995?

On July 7, Respondent had a further layoff, this time laying off the 10 employees named below:

Javier Garcia	William Rosales
Camilio Ramirez	Marco Posadas
Guadalupe Leal	Jose Melendez
Eliseo Serrano	Antonio Pivaral
David Contreras	Erick Hernandez

John and Issac Bazbaz testified that the decision to make the July layoff was prompted by continuing negative results and the outlook for the future. They testified that a decision was made to discontinue production of HDPE because it was not profitable. Ceasing this production line caused the layoff. John Bazbaz testified that the demand for polypropylene remained constant and the Company decided to concentrate its efforts in this market. Isaac Bazbaz testified that prior to this layoff, Respondent attempted to cut costs. The primary means used was to cease allocating administrative expenses from the parent corporation to the Respondent. It hired an administrative plant manager to perform some of the tasks that had been performed by the parent. This manager, Luis Mendoza, was also a potential investor in the Respondent, though he had not invested in the Company as of the date of his testimony herein. Subsequent to the layoff, Respondent did run some HDPE in order to meet the demands of customers for its large existing inventory of HDPE. According to Respondent, these customers were willing to buy some of the existing stock, but only if they were also offered some custom HDPE at the same time.

With respect to the July layoffs, John Bazbaz testified that he instructed Javier Guerrero to tell him how many people it would require to just run polypropylene production and then to select the employees to be laid off based on the criteria of attendance, tardiness, and skills.[55] The positions eliminated by elimination of the HDPE production were grinders, washers, one forklift operator, and the janitor. According to John Bazbaz, the layoff has not resulted in additional overtime for the remaining employees. There have been occasions when overtime was granted because a weekend shift was necessitated by lack of material or a broken machine that made overtime necessary to meet the promised delivery date to a customer.

Guerrero testified that he was instructed by John Bazbaz to review attendance, skills, and warnings to select the persons to be laid off. Records relating to attendance and warnings for three months preceding the layoff were looked at in making the selection decision. Guerrero announced the layoff to the affected employees in two groups of five employees each. According to Guerrero, he told the employees that they did not have enough material, and that with respect to HDPE, that production would cease because the price was very unstable. He denies mentioning the Union in either of these discussions and denied that Union support played any part in the selection process.

[55] Isaac Bazbaz testitied that these criteria were absenteeism, tardiness, and warnings.

Some of the affected employees had a different version of these layoff meetings. Jose Melendez testified that at the meeting at which he was laid off, Guerrero told the gathered employees that management had made an evaluation regarding warnings and tardiness, and based on that evaluation, had decided to lay off 10 employees, including those at the meeting. Melendez complained because he had been told by Guerrero in May that the employees retained after the January layoff should not worry because the ones retained at that point were the best employees. According to Melendez, Guerrero then said they were being laid off because of being involved with the Union. The only time Melendez had been tardy between the date of his testimony and the layoff was the day he testified. He gave notice that he would be late that day and was told that it was all right.

David Contreras was told he was being laid off in a meeting with fellow employees Erick Hernandez and Antonio Piveral. According to Contreras, Guerrero told them that management had decided to lay off some employees because there was not much work. Guerrero said they had selected employees for layoff taking into consideration attendance, cooperation shown to the factory, and warnings. Contreras asked if they were going to be recalled and Guerrero said maybe they would if there was work. Contreras was called back from layoff by Guerrero on a temporary basis and worked 1 week in August. Eric Hernandez was also recalled at the same time on the same basis.

Camilio Ramirez learned he was being laid off from Supervisor Israel Zepeda, who allegedly told him that Javier Guerrero wanted to know why he had taken so long with the decision.[56] In any event, Ramirez was sent to the laboratory and laid off by Guerrero. In this meeting, Guerrero also laid off William Rosales, Marco Posadas, Guadalupe Leal, and Javier Garcia. Guerrero told them that due to economic problems and the inability to get materials, employees were being laid off to keep the Company alive. Guerrero said the employees had been selected for layoff because of warnings, absences, and tardies. Garcia asked why he was being laid off because he had no warnings and had not been late or absent. Guerrero told him that the Company could not pay a person for just sweeping, which was Garcia's job. Leal asked why he was being laid off and Guerrero said it was for warnings.

Rosales testified that about 3 days before he was laid off on July 7, Supervisors Fernando Molina, Israel Zepeda, and Augustine Garcia asked him how much he paid a month for his car and how many monthly bills did he have. None of these supervisors explained why they wanted this information. Rosales speculated that it was connected somehow to the layoff. He was laid off on July 7 at quitting time. He was told on that date to report to Respondent's laboratory. When he arrived there he was met by Guerrero, who told him to wait until some other employees arrived. Shortly thereafter, he was joined by Marco Posadas, Guadalupe Leal, Javier Garcia, and Supervisors Zepeda, and Robles. Guerrero told the employees that because the workload was very slow, the Company had decided to lay off employees and the gathered employees were in that group. Guerrero added that the laid-off employees had warnings and faults, including absenteeism. Rosales testified that he had been late for work about five times in the period between

[56] I presume this is meant to refer back to the conversation Rameriz had with Bazbaz in April when Bazbaz allegedly tried to get Rameriz to testifiy against the Union.

his first testimony and the day of the layoff. He added that on those occasions he had called in to announce that he would be late and was not told by the supervisors to whom he spoke that he could suffer adverse consequences by being tardy.

Since the layoff, Respondent has hired back two employees on a temporary basis for a 1-week period, and hired back two on a permanent basis. According to Bazbaz, to select the persons recalled, he instructed Guerrero to look first to the January layoff list and the employees on that list who had complied with its instruction to write a letter telling of their willingness to be recalled and giving their current address and phone number. Bazbaz testified that only two or three of the employees laid off in January had sent such a letter. He also told Guerrero to look at the second group of employees laid off if he could not find someone for recall from the January list. The employees recalled temporarily were David Contreras and Erick Hernandez. The employees recalled permanently were Antonio Pivaral, Guadalupe Leal, and Erick Hernandez. Hernandez quit a few days after being recalled. Although Respondent had the names and phone numbers of most, if not all, of the employees laid off in January, it did not call these people to see if they wanted to return to work. Instead, it only called those who had complied with its directive to write in acknowledging such a desire. Subsequent to the July layoff, Respondent's chemical engineer, Ivanoff, and a clerical, Denise Bardon, were laid off and Supervisor Zepeda quit.

As of the date of the second hearing, Respondent employed about 20 production employees and about 30 some odd employees overall. The Company is currently running three shifts 4 to 6 days a week. Hallatt remains employed as a consultant and he testified that the Company has continued to try to automate more of its processes and noted that since the last hearing it has built cranes and modified conveyors that simplify the labor needed. It has also increased the productivity of the machines.

I am not convinced that the July layoff or the selection process used was discriminatorily motivated as was the January layoff and the January selection process. Only one of the employees laid off testified that the Union was mentioned as a reason for laying off employees. Other employees laid off at that meeting did not corroborate this testimony. Moreover, Respondent's reasons for the layoff ring true given the state of the market for HDPE. The employees laid off did not include non card signers, but the group was also not limited to witnesses in the prior hearing. Some of the actions taken subsequent to the July layoff for once support Respondent's economic defense, primarily the laying off of Ivanoff, who was needed only to consult on HDPE production. Respondent's reasons for reinstating some limited HDPE production post-layoff also seem reasonable. The timing of this layoff is also consistent with market conditions as described by expert witness Kopulsky whereas the timing of the January layoff was not. In all, I find that though Respondent clearly harbors union animus, and had knowledge of the laid-off employees' union sympathies, it conducted the July layoff for legitimate economic reasons.

G. Is a Bargaining Order a Proper Remedy in this Case?

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court approved bargaining order remedies for "outrageous" and "pervasive" unfair labor practices, even without a showing that the union involved ever possessed evidence that it was the majority representative of the unit of employees who have been affected by such unfair labor practices. In *Gissel,* supra at 614–615, the Court also approved the use of bargaining order remedies in a second category of cases that it described as:

> less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy, in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practice and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through (authorization) cards, would, on balance, be better protected by a bargaining order, then such an order should issue.

I believe a bargaining order remedy is warranted in this case under either category of cases established by the Supreme Court. Regarding the first category, the Second Circuit explained:

> Certain violations have been regularly regarded by the Board and the courts as highly coercive. These are the so-called "hallmark" violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists. They include such employer misbehavior as the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of Section 8(a)(3) of the Act.[57]

In the instant case, Respondent by threatening employees with layoff, discharge, and other, unspecified reprisals for supporting the Union, and then following up the threat with a layoff of almost 50 percent of the work force, including only union supporters, certainly has committed a "hallmark" violation.[58] It has followed the January layoff with further acts of reprisal against known union supporters and against those who testified in the first hearing, as set out above. Under the circumstances the chances of securing a fair election at Respondent's facility are nil in my opinion. However, even if these violations are considered by some appellate body to not fall into the so-called "hallmark" category, a bargaining order should issue as the facts of this case certainly fall into the second category of cases in which the Supreme Court has found the bargaining order remedy proper.

1. The Union secured authorization cards from a large majority of Respondent's nonsupervisory employees.

[57] *NLRB v. Jamaica Towing Co.,* 632 F.2d 208, 212 (2d Cir. 1980).

[58] See *Great Chinese American Sewing Co. v. NLRB,* 578 F.2d 251 (9th Cir. 1978); *Townhouse TV & Appliances*, 213 NLRB 716 (1974); *NLRB v. Balsam Village Management Co.,* 792 F.2d 29, (2d Cir. 1986), cert. denied 479 U.S. 931 (1986); and *Bandag, Inc. v. NLRB,* 583 F.2d 765 (5th Cir. 1978).

General Counsel's Exhibit 2, 1-58 represents the union authorizations cards relied on to demonstrate majority status at all relevant times in this case.[59] All of these cards were signed before the layoff in January 1995. During the course of the proceeding, the following cards were offered and received into evidence: 1, 3, 4, 6, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58 (48 cards out of a unit of 64 employees). The cards were authenticated in four ways; (1) the 16 people who attended the January 18 union meeting and the testimony of Andy Garza; (2) the testimony of persons who witnessed the signing of the card, such as Lucio Aviles and Luis Castro; (3) the testimony of the card signer; and (4) comparison of samples of card signers handwriting and the signatures appearing on the cards.

The cards are printed in both English and Spanish and clearly state that their purpose is to secure union representation, and additionally, union membership. There is no evidence that the cards were represented to potential signers as being solely for the purpose of securing an election. To the contrary, at a meeting held by the Union on January 18 where a large number of these cards were signed, Allen Dawson, the regional director of organizing for the ILGWU, spoke to the employees. Dawson told the employees that signing the card was for the purpose of becoming a union member and to allow the person to be represented by the Union. He instructed them that the person acting as a witness should make sure the signer read the card and understood it. Dawson was asked by an employee if he would have to pay union dues after signing the card. Dawson answered that dues did not have to be paid until the employees had a contract with Respondent. Dawson said the card could be used to obtain recognition from the Company, and that if recognition was not given, then there would be an election. No promises were made by the union representatives at this meeting to induce employees to sign cards. I can find no credible evidence that any promises were made to secure the signing of any card admitted into evidence.

All of the card signers who were also currently working for Respondent at the time of their testimony were asked: "Did you know or are you aware of any news reports that officers of the International Ladies Garment Workers Union were accused by the US Government of taking bribes?" None of the witnesses were so aware. The following employees testified that they signed their authorization cards after having read and understood them and additionally testified that they were not promised anything as an inducement to sign the cards: Marco Antonio Posadas (46), .Alejandro Blasio (11), Julio Rodriquez (51), William Rosales (54), Nery Mendoza (35), Camilio Ramirez (47), German Eli Joya (29), Lucio Aviles (7), Javier Garcia (23), Luis Castro (1 6), Mario Perez (43), Jorge Aguilar.(3), Jose Melendez (33), Jose Giron (24), Juan Torres (57), Felix Jovel Palacios (41), Bethuel Montes de Oca Mendoza (38), Jose Americo Rosales (53), Rudolfo Bocanegra (12), Luis Napoleon Martines (32), Hugo Benavides (10), Godfredo Reyna (50), Clemente Garcia (21), David Arroldo Contreras (18), Erick Ricardo Hernandez Estrada (27), Subrino Guerra (26), Jesus Martines (31), Leonel Campoverde (14), Nicolas Chajon (17), Jose Ascensio (6), Manuel Perez (42), Efrain Villatoro (58), Guadalupe Leal (30), Oscar Godinez (?25), Pedro Antonio Molgar (34), Eliseo Moises Serrano (56),[60] Nelson Rodriquez (52).[61] The card signed by Antonio A. Calderon (13), was withdrawn as the individual signed the English language side of the card and cannot read English.

I also compared the signatures on a group of cards with other records showing individual's signatures. By this method, I found the following cards to be authenticated: 4, 19, 28, 48, and 49. The remaining five cards admitted into evidence were authenticated by the person witnessing the signing.

The Union made a written request for recognition in May 1995 and it was refused by Respondent. Despite the showing of overwhelming support at the hearing in this proceeding, Respondent continues to refuse to recognize the Union. Further, It's efforts to stifle support may be having the desired effect on those employees who remain employed by it. The Union representatives testified credibly that attempts to contact employees who had signed authorization cards and who were still employed met with resistance. These employees would not talk with them on the phone and would not let them in their places of residence. Medrano characterized the campaign as dead following the layoffs. The filing of charges with the Board revived the campaign to an extent, but not nearly to the level before the layoffs. The Union has been unable to secure the signing of cards from present employees of Respondent since the layoff.

Respondent asserts in its defense against the issuance of a bargaining order that such an order is not permissible because the ILGWU merged with the Amalgamated Clothing and Textile Workers Union on July 1, 1995, after a vote of the membership taken in June 1995. These dates are of course after the commission of most of the unfair labor practices found here and after the demand for recognition made by the Union. With regard to this defense, the key issue for determination is whether UNITE is a new representative of the employees of Respondent, or only a continuation of the incumbent ILGWU. Case law demonstrates that if a postmerger entity is found to be a continuation of the prior representative, then continuity of representation exists and due process will permit the new entity to represent bargaining unit employees. In *Western Commercial Transport,* 288 NLRB 214 (1988), the Board enunciated a four-part test for determining whether continuity of representation exists.

[59] With regard to the question of an appropriate unit, John Bazbaz testified that employees who occupied positions such as operators, helpers, forklift drivers, mechanics, and electricians should vote in an election. Generically, that type of person is a production and maintenance person. Excluded from the unit are all other employees and supervisors as defined in the Act.

[60] On cross-examination, Serrano testified that he was promised certain benefits as a member of the Union. Specifically, he testified that "The benefits that I have been told about are those for which we are fighting. The benefits we don't enjoy as workers are those for which we want to be with the union." "[And I] would repeat again, if they tell you or they talk to you about joining an organization where it is because we are going to enjoy some benefits, on the contrary I would not sign." Serrano later explained that he was speaking about what union organizer Medrano had told him. He said Medrano talked about the Union wanting to represent him, that the union would try to get a contract, that the Union would try in negotiations to get benefits. Medrano said that the benefits the Union would try to get were vacation, holidays, and health insurance.

[61] Rodriquez on cross-examination testified that Lucio Aviles promised him something with respect to wages and paid vacation if he supported the Union. Clarifying his answer, he testified that he was promised the Union would bargain for increased wages and benefits. He further testified that Aviles told him the Union would try to get these thing. No one guaranteed him that these things could be achieved.

(a) Continued leadership responsibilities by the existing union officials;

(b) Perpetuation of membership rights and duties, such as membership eligibility and dues structure;

(c) Continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated, and

(d) Preservation of the certified union's physical facilities, books, and assets.

Catherine Waelder is the associate general counsel for the ILGWU. She sponsored Respondent's Exhibit 24, with attachments A and B. The exhibit is the Merger Agreement between the ILGWU and the Amalgamated Clothing and Textile Workers Union. Exhibit A, is the constitution for UNITE; and Exhibit B, is described as, "Certificate of Consolidation of International Ladies' Garment Workers' Union and Amalgamated Clothing and Textile Workers Union." The Merger Agreement was signed by the presidents, general secretary, treasurer, and executive vice presidents for each union, the International Ladies' Garment Workers'Union, and also, the Amalgamated Clothing and Textile Workers Union, on February 16, 1995.

Waelder described the merger as a consolidation and a continuation of two proud unions going forward as a new entity. There will be some ways in which the International Ladies' Garment Workers' Union does continue. It is not being dissolved or terminated, and that is reflected in the merger agreement. When the merger agreement is approved by the membership of the involved unions, effective July 1, then all members of the constituent unions will become members of UNITE. After the merger, inter alia, the ACTWU secretary and treasurer will become the secretary/treasurer of UNITE. and thus, the secretary/treasurer of the ILGWU will no longer serve in that capacity. There will be a consolidation of the executive vice presidents of each consolidated union. The executive vice presidents for the newly-formed union will be double the size of the presently existing slate of vice presidents for either union. Over time, they will endeavor to reduce the number of vice presidents. The existing constitutions for the ILGWU and ACTWU will only remain in force and effect to the extent that they are not inconsistent with the new constitution of UNITE.

The members of the two consolidating unions becoming members of UNITE. Members of the constituent union shall be deemed members of UNITE without the payment of initiation fees or membership fees. However, new members that are gained after the date of the merger will be charged an initiation fee, depending upon the situation. In the context of an organizing campaign, frequently, there are no initiation dues.[62] It is up to the regions as to whether an initiation fee will be charged once UNITE is formed. The International president, with the approval of the GEB, has the power to set the amount or waive the payment of initiation fees by locals formed after June 30, or where special circumstances so require.

Respondent's Exhibit 24 will be deemed an amendment to and a substitution for the separate constitutions of the ILGWU and ACTWU. The membership of the constituent unions have been advised of the proposed merger in several ways, including articles in the last several issues of the union's newspaper, *Justice*, which goes to every member, as well as to delegates, talking about the upcoming merger vote and providing information about the merger, answering questions and providing answers. There was also a package of information sent to all the delegates to the convention, with a cover letter, including the delegates' merger guide, the merger agreement, and the UNITE constitution. ILGWU President Mazur and, perhaps, other senior officials of the union have been traveling around the country and have been meeting with staff and members and answering questions about the merger.

Subsequent to the merger, there will be no change in the personnel who would represent a unit of ILGWU members in Houston, Texas, whether the representation is by a local or a district council. District councils, locals, joint boards, their staffs, their offices continue unchanged postmerger. The staffs of the Internationals will be merged. Affiliates are separate, autonomous labor organizations affiliated with the ILGWU or the Amalgamated. Assuming the merger goes through, postmerger, they become affiliates of UNITE. Affiliates are independent entities, but governed by the constitution of the organization with which they are affiliated. The operations of an affiliate are not changed by the merger.

A district council is an affiliated union in the ILGWU. It has local unions, district councils, joint councils and joint boards. All of those are affiliated labor organizations. There will be no change in the district council, post merger. Those officers who were elected by the members or the constituent organizations of an affiliated union remain the same. There will be some changes for some locals in the dues structure, not for all of them. The minimum dues are going up, by the UNITE constitution, to $17 a month, which is the current monthly dues for the involved district council, so for them, there would be no increase.

The merger agreement provides that UNITE shall encourage internal mergers and consolidations of affiliate regions, departments and the Canadian conferences as quickly as possible. This however is a voluntary decision of the affected affiliates. Internal mergers and consolidations shall require the approval, not just of the GEB, but also of the executive boards or board of directors of the affected affiliates. This provision survives the expiration of the merger agreement. This means affected affiliates never have to merge with another affiliate unless they choose to do so.

There will be no substantive changes in procedures mandated by the merger that the district council uses in dealing with units of members under its jurisdiction. Prior to the merger the ILGWU had provisions governing the way district councils are run, and also had provisions governing the way joint boards were run. It had a provision that said that, in the absence of a constitution, and most district councils do not have their own constitution, district councils would run in the same fashion as a joint board. The UNITE constitution followed the Amalgamated provisions on how the joint boards would be governed because they have far more joint boards than the ILGWU does. However that is not true for ILGWU's district councils because it has more district councils than Amalgamated does. So what was in the joint board section of the ILGWU's constitution was put it into the district council section of the UNITE constitution, which means that, where it used to be a cross-reference, now it is right there, spelled out in text for how a district council runs. It is substantively the same.

The involved district council is serviced by the central states region of the ILGWU. The central states region is an administrative arm of the union, not an affiliated labor organization. It

[62] Union Representative Betty Boyer testified the involved employees of Respondent would not be charged an initiation fee.

is governed by the language encouraging mergers of regions. But nothing happens without consent. So post merger, without speculation, no immediate change will occur, and, perhaps, no change indefinitely.

All applicants for membership shall complete and sign an application form of the local or of UNITE. If employees of Respondent become members of the Union, they will be members of UNITE and a member of the district council that exists today as a part of the ILGWU. The Union resulting from the merger will be more than double the size of the present ILGWU membership. The present approximate membership in the ILGWU is approximately 160,000 members. The resulting membership in UNITE following the merger will be approximately 350,000 active members.

Assuming that the ILGWU entity that has been involved with U.S.A. Polymer employees has bargaining rights, post-merger, they continue as they did before with the same staff, the same elected leaders, the same business agents and personnel. There are two provisions in the merger agreement that speak to local affiliates. One of them is section 5, entitled, "Local Unions and Other Chartered Bodies," on page 14. Section A(2) of section 5, the specific statement that, "Current officers of the affiliates of either constituent union shall, upon the effective date of the merger, continue to serve in their elected capacities." Beginning at page 24, and running on for a few pages, there is a section 10 entitled, "Rights and Obligations of UNITE and the Constituent Unions." Paragraph C on this point, in paragraph C(1), the document explicitly provides that, "The merger of the ILGWU and the ACTWU shall not affect, interrupt or change in any way the continuing status or the rights and duties with respect to third persons of either the ILGWU or the ACTWU or their affiliates," which includes the Texas/-Oklahoma/Arkansas district council, which is an affiliate. This includes, but is not limited to recognition agreements and collective bargaining agreements or the continuity or renewal thereof. The agreement specifically provides that the merger does not interrupt the status or the rights and duties of the parties with respect to negotiation of agreements.

Waelder testified that post-merger, there is no need to secure new authorization cards. Members of the ILGWU and members of the Amalgamated will become, automatically, members of UNITE, without filling out any new documents to make that happen.

I find that the testimony and exhibits presented through Waelder clearly established the criteria set out by the Board and demonstrates continuity of representation. The fact that the employees of Respondent did not vote in the delegate convention that resulted in the merger of the ILGWU and ACTWU is irrelevant. In *NLRB v. Financial Institution Employees,* 106 S.Ct. 1007 (1986), the Supreme Court held that the Act does not require that nonmembers be permitted to vote in union affiliation elections. In the case of *American National Insurance Co.,* 124 LRRM 1116, (1986), that Court found that a union's exclusion of non-member unit employees from a merger vote does not preclude finding a violation of the Act based on respondent employer's refusal to recognize and bargain with a newly merged entity., precisely because continuity of identity between the premerger and the postmerger bargaining representatives was established. Thus, I find that UNITE, through its continuity of identity with the ILGWU, has the authority to bargain on behalf of Respondent's unit employees.

In conclusion, I find, for the reasons stated above, that the merger does not offer any impediment to the issuance of a proper bargaining order and I will recommend that a bargaining order issue in this proceeding.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The employees of Respondent falling into the unit described below for a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

4. Respondent has violated Section 8(a)(1) of the Act by the actions of its supervisors and agents during the months of September, October, November, and December 1994 and January 1995, at its facility, by:

(a) Coercively interrogating employees about their union sympathies and activities, and the union sympathies and activities of fellow employees.

(b) Threatening employees with more onerous working conditions, physical harm, layoff, discharge, and other, unspecified reprisals, for engaging in union or other protected concerted activities.

(c) Creating the impression of surveillance and subjecting employees to surveillance because of their union or other protected converted activities.

(d) Promising employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

5. Respondent has violated Section 8(a)(3) and (1) of the Act by:

(a) Commencing on or about January 27 and continuing until on or about January 30, 1995, permanently laying off the employees named below because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity:

Miguel Alanis	Mario Aparicio
Lucio Aviles	Hugo Benavides
Alejandro Blasio	Rodolfo Bocanegro
Edgar Gerardo Carrera	Luis Castro
Nicholas Chajon	Elias Escobar
Julio Hector Garcia	Jose Giron
Oscar Godines	German Joya
Luis Martines	Pedro Molgar
Nery Mendoza	Miguel Molina
Bethuel Montes de Oca	Mauro Moran
Walter Jose Orellana	Felix Jovel Palacios
Manuel Perez	Miquel Angel Molina
Mario Perez	Nelson Rodriquez
Jose Rosales	Lionel Campoverde
Noe Ramirez	

(b) Selecting the above-named employees for permanent layoff because they supported the Union or engaged in other protected concerted activities.

(c) Eliminating the job classification of electrician to avoid rehiring its discharged electrician, Luis Aviles, because he supported the Union and engaged in union or other protected concerted activities.

6. Respondent has violated Section 8(a)(1) of the Act by issuing employees being laid off in January 1995, a letter requiring them to call in on a daily basis or risk losing their right to recall or termination, because they supported the Union or engaged in other protected concerted activities.

7. Respondent has violated Section 8(a)(4) and (1) of the Act by:

(a) John Bazbaz coercively interrogating employees about their union support and demeaning the Union in April 1995.

(b) Verbally warning employees not to talk with other employees or threatening employees with unspecified reprisals because they gave testimony in a Board hearing contrary to the interests of Respondent.

(c) Interrogating employees about their testimony given in a Board proceeding and advising employees to ignore Board issued subpoenas.

8. Respondent has violated Section 8(a)(4), (3), and (1) of the Act by:

(a) Reducing the working hours of employees and withholding overtime work to employees because they gave testimony in a Board hearing and because they support the Union or otherwise engaged in protected concerted activity.

(b) Imposing more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a Board proceeding, supported the Union and engaged in other protected concerted activity.

(c) Issuing written warnings to employees and discharged employees because they gave testimony in a Board proceeding and supported the Union or engaged in other protected concerted activity.

9. Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees in the above defined unit.

10. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[63]

The Respondent having discriminatorily discharged the employees who are named in paragraph 5(a) above, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[64] Similarly, Respondent unlawfully retaliated against employees William Rosales, Camilio Ramirez, Jose Melendez, and Jesus Martines by denying them scheduled working hours and/or overtime hours. It must make these employees whole for lost earnings as a result of its unlawful actions in the manner set out immediately above.

Reinstate the position of electrician at its facility and offer Luis Aviles reinstatement to this position in addition to the actions set out in the paragraph above.

Rescind the written warnings given to William Rosales and Marco Posadas, remove any record of such warnings from their personnel files, and inform them in writing that this has been done and that such warnings will not be used against them in any way.

Respondent has unlawfully withheld recognition from the Union and has refused to bargain with the Union, therefore, Respondent should be Ordered to, upon request of the Union, extend recognition to it as the collective-bargaining representative of the Respondent's employees in the unit found appropriate, and to bargain in good faith with the Union over the hours, wages, and other working conditions of unit employees and if agreement is reached, embody such agreement in a written collective-bargaining agreement.

Because of the serious nature of the violations committed by Respondent and because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[63] I have found that Respondent unlawfully imposed a call-in requirement on laid-off employees. Respondent voluntarily rescinded this requirement prior to hearing and thus no affirmative action is necessary to remedy this violation.

[64] Respondent discriminatorily discharged its employee Marco Posadas, but immediately remedied this action from the standpoint of backpay liability by reinstating him before any loss of earning occurred. As I found in a preceding section of this decision, a layoff among unit employees would have occurred for legitimate reasons at some point after January and before June 1995, affecting an uncertain number of employees. The evidence adduced in this record is insufficient to determine the legitimate date of such a layoff and the number and identity of those employees who would be affected by such a layoff. It will be left to the compliance stage of this proceeding to make these determinations.